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**ABOLITION OF COURT-MEMBER SENTENCING IN THE MILITARY**

**A Thesis**

**Presented to**

**The Judge Advocate General's School, United States Army**

**The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other governmental agency.**

**by Major James Kevin Lovejoy, JA  
United States Army**

**41st Judge Advocate Officer Graduate Course  
April 1993**

## **ABOLITION OF COURT-MEMBER SENTENCING IN THE MILITARY**

**by Major James Kevin Lovejoy, JA  
United States Army**

**ABSTRACT:** This thesis examines the question of whether court-members are qualified to perform the complicated and important task of adjudging fair and appropriate sentences for servicemembers convicted by a military courts-martial. After tracing the origins of our current sentencing procedures and a brief comparison to the Federal and state criminal sentencing procedures, the thesis analyzes the advantages and disadvantages of sentencing by lay court-members versus sentencing by military judge alone from the perspectives of the key players involved in military justice: the accused; the government/trial counsel; commanders/court-members; military judges; and the general public. The thesis concludes with the recommendation that court-members be eliminated from the sentencing process, and military judges assume this responsibility exclusively.

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# **ABOLITION OF COURT-MEMBER SENTENCING IN THE MILITARY**

**Major James Kevin Lovejoy, JA**

**United States Army**

## **I. Introduction. .**

**MJ:** "The court will be closed to deliberate on sentence."

**TC:** "Let the record reflect the members have exited the courtroom and entered the deliberation room."

**PRES:** "Alright, before we vote on a sentence, does anyone have anything they want to discuss?"

**MEMBER 1:** "I do. We all know the defendant was lying through his teeth on the merits. I think we ought to max him out."

**MEMBER 2:** "We've heard this story before about how he came from a broken home and was abused by his father. Lets not make the same mistake we did last time when we didn't give the defendant a DD."

MEMBER 3: "I'm confused. We heard a lot of testimony about the defendant's lack of rehabilitation potential. Just what exactly does that mean? Since he doesn't have any should we give him a longer sentence or just give him a kick?"

MEMBER 4: "I don't know, I can't help but think that 'but for the grace of God go you or I'. Maybe we should go a little bit easier on the guy."

MEMBER 5: "Are you kidding. We gave him the benefit of the doubt on the charges he pleaded not guilty to, and then after we acquit him, the judge tells us he had earlier pleaded guilty to this one. That ticks me off. I think he deserves to be maxed."

MEMBER 6: "I kind of agree with you, after all, he did make an unsworn statement during sentencing and the judge says that can't be cross-examined. If he was telling the truth he would have made a sworn statement."

MEMBER 5: "I thought we had agreed during findings that since it was a really close case, we'd go ahead and convict him of the offense, but then cut him some slack during sentencing."

MEMBER 7: "That's right. Plus, the victim was a bum who got what he deserved. Why punish this guy, who's got a good military record, just because some degenerate started a fight that the defendant decided to finish."

MEMBER 7: "My biggest concern is how this will effect his retirement benefits. Anybody got any idea how that works?"

MEMBER 8: "Not exactly, but my brother-in-law is a parole officer, and he tells me the average prisoner gets out on parole after serving less than a third of the adjudged sentence. So we better not be too lenient."

MEMBER 2: "That brings up another issue. If this guy pleaded guilty he must have a pretrial agreement with the CG. I know we're not supposed to concern ourselves with that, but it sure seems to make this whole process a waste of time."

MEMBER 4: "The only other thing I'd like to mention is that this crime is awfully similar to the trial last week. The CG sure was upset about the results of that court-martial."

MEMBER 1: "I know the judge told us to disregard it, but I can't help but think about the trial counsel asking that defense witness if he knew the defendant was an alcohol rehabilitation failure."

PRES: "Well, lets get down to it. Everybody write down what they think is an appropriate sentence. ...."



MEMBER 5: "We're supposed to vote on the least severe proposed sentence first. Anybody got an idea whether a BCD, 18 months, and a fine but no forfeitures, is less than a DD and 12 months confinement, with two-thirds forfeitures?"

If you were the accused in this case, would you feel comfortable knowing that these are the kinds of things court-members might be considering during sentencing deliberations? Or would you feel a little more comfortable knowing a military judge specifically trained in the laws and principles of sentencing, was deciding your fate?

Although the above scenario is admittedly a bit extreme, its intended to demonstrate the multitude of issues that may cause a panel to reach an unjust sentence for an accused. Because there are so many inappropriate and irrelevant factors that may be considered by members during their sentencing deliberations, it is imperative that the military establish sentencing procedures that minimize the risks of such occurrences.

The risks of improper sentences from court-members could be reduced through continued piecemeal changes to the current procedural rules governing sentencing. However, a far more efficient and effective change is to completely eliminate court-members from sentencing, and turn the entire process over to military judges trained in the laws and principles of sentencing.

The norm in our country is for the trial judge to determine the appropriate punishment for an offense. In the federal criminal system and in forty-two of the fifty

states, judges decide the sentences in all non-capital criminal trials.<sup>1</sup> Jury sentencing has been criticized for a number of years. It has been characterized by some as "sanctified guessing",<sup>2</sup> "sentencing by lottery",<sup>3</sup> a "crapshoot,"<sup>4</sup> and "amateur brain surgery".<sup>5</sup> Although he didn't question the constitutionality of jury sentencing, Justice Potter Stewart did have "serious questions about the wisdom of such a practice."<sup>6</sup> Five of the thirteen states that at one time used the jury for sentencing have since done away with that practice.<sup>7</sup>

Criticism of the military practice of court-member sentencing can be traced to the historic *Crowder-Ansell* dispute following World War I.<sup>8</sup> Court-member sentencing has come under more recent review during the revision of the 1984 *Manual for Courts-Martial*. Congress tasked the Military Justice Act of 1983 Advisory Commission to conduct an in-depth analysis of several issues related to military justice including "whether the sentencing authority in court-martial cases should be exercised by a military judge in all non-capital cases to which a military judge is detailed?"<sup>9</sup>

Although many consider sentencing to be the most important phase of a criminal trial in terms of its impact on an accused's life,<sup>10</sup> it has perhaps been overshadowed by the attention given to the guilt or merits portion of a trial. Numerous statutes and rules of criminal procedure deal with proving the guilt or innocence of an accused, while very few are focused on determining an appropriate sentence once criminal guilt is proven beyond a reasonable doubt. Even the Constitution reflects a preoccupation with guilt as opposed to punishment. Of all the articles and amendments to the Constitution related to criminal trials,<sup>11</sup> the only restriction with respect to punishment is that it not be "cruel

and unusual."<sup>12</sup> In a similar vein, of the twelve chapters in the Rules for Courts-Martial only one is devoted to sentencing.<sup>13</sup>

The relatively small number of procedural sentencing rules is due in large part to the fact trained judges perform the sentencing function in most jurisdictions. Prior to the recent phenomenon of sentencing guidelines, federal and state court judges were entrusted with the grave responsibilities of sentencing with very few procedural limitations. The military on the other hand, in order to maintain the tradition of member sentencing, has created a convoluted sentencing process that often keeps relevant sentencing evidence from the lay court members because they cannot be trusted to properly apply it.<sup>14</sup>

In the military, sentencing has historically been a function of command. Much to the chagrin of commanders, control over military justice has bit by bit shifted from their hands into the arms of judge advocates and military judges.<sup>15</sup> Eliminating members from sentencing may be viewed as simply another step in this direction. Consequently, the decision to eliminate court members from sentencing likely depends upon ones view on the much broader issue of whether courts-martial are a system of justice owned by attorneys,<sup>16</sup> or a tool of discipline owned by commanders.<sup>17</sup> As one might expect, the battle lines have been drawn between lawyers and commanders. Attorneys believe military judges are better qualified to assess appropriate sentences. Convening authorities and commanders feel panels are better suited to perform this task.<sup>18</sup>

An understanding of what constitutes an appropriate sentence is necessary before we can determine who is better suited to determine the appropriate punishment in a military court-martial. In the civilian court system there are generally four recognized purposes of sentencing: (1) punishment/retribution; (2) general deterrence; (3) incapacitation/individual deterrence; and (4) rehabilitation.<sup>19</sup> An additional purpose in the military is for the sentence to aid the command's efforts to maintain good order and discipline.<sup>20</sup> Sentencing trends in the federal and state courts have shifted over time from strict retribution for the offense - *an eye for an eye* - to individualized sentences focusing more on the offender and rehabilitation.<sup>21</sup> However, with the demise of rehabilitation efforts, the tough anti-crime legislation of the 1980s, and the emergence of sentencing guidelines, the trend has begun to turn back towards retribution for the offense and general deterrence.

The military has experienced similar trends with respect to the perceived goals of sentencing. Prior to 1949, sentences focused on retribution for the offense since there was no provision in the *Manual for Courts-Martial (Manual)* for evidence to be offered about the offender. Under the 1951 *Manual*, members had access to information about the defendant and sentences began to focus more on rehabilitation.<sup>22</sup> But due to the high quality of the all-volunteer force in the 1980s and the more recent downsizing of the military, rehabilitation has lost its attractiveness.<sup>23</sup>

Although specific purposes of sentencing (e.g. retribution or rehabilitation) have fallen in and out of popularity, the wiser practice, and avowed goal of sentencing in today's military is to adjudge a sentence that considers all five purposes listed above.<sup>24</sup>

This is not a simple task.<sup>25</sup> To adjudge a sentence that achieves these goals, the sentencing body must: (1) have access to all relevant information about the defendant; (2) understand the principles of penology and the administrative consequences of sentences adjudged; (3) treat defendants fairly and equally;<sup>26</sup> and (4) understand the impact the sentence will have on military discipline. This is far too difficult a task to be left to lay court-members who are untrained and inexperienced in the science of criminal sentencing.

In order to evaluate the merits of adopting mandatory sentencing by military judges, it is necessary to first identify the current sentencing procedures, and how they came to exist. They will then be evaluated from the perspectives of the people most effected by them: namely, the accused, the government/trial counsel, commanders/court members, military judges, and the general public.

## II. Current Sentencing Procedures under the UCMJ.

### *A. Forum Options.*

Soldiers facing courts-martial have four different options to choose from regarding their plea and the composition of their court-martial. They may elect to: (1) be tried by members for both the merits and sentencing; (2) be tried by military judge for both the merits and sentencing; (3) plead guilty before a military judge and be sentenced by members; or (4) plead guilty and be sentenced by a military judge.<sup>27</sup> The option soldiers do not have is to be tried by members on the merits but sentenced by a

military judge.<sup>28</sup> This often poses a significant problem for the accused, because the sentencing consequences of his choice between members or the military judge may prevent him from choosing the most favorable forum with respect to guilt. There is a common belief among those who practice military justice, that *as a general rule* defendants stand a better chance of acquittal with members. However, its also the general consensus that if convicted by members, the defendant stands a greater risk of being *hammered* by the same members during sentencing.<sup>29</sup> In light of this phenomenon, defense counsel are more likely to advise their clients to forfeit their right to trial by members in order to avoid the heightened risk of a more severe sentence.<sup>30</sup>

Although the MCM gives the accused the right to request trial by military judge alone, this right is not absolute.<sup>31</sup> The military judge has the discretion to grant or deny the request, which may force the defendant to be tried and sentenced by a forum not to his liking.<sup>32</sup> Common reasons for disapproving requests for trial by judge alone are if the military judge has tried a co-defendant, or has heard testimony during an improvident plea.<sup>33</sup> Former Chief Judge Everett, of the Court of Military Appeals, recognized that this discretion can cause problems for an accused, as there are often very cogent reasons for wanting trial by judge alone: "namely (a) a desire to be tried [and sentenced] by an official who is not under the command of the convening authority and who referred the charges for trial; and (b) a wish to have guilt adjudged and sentence imposed by an officer who is legally trained."<sup>34</sup>

The military's option for an accused to be tried by a military judge sitting without members was patterned after Federal Rule of Criminal Procedure 23b, with one

significant difference. The Federal Rule requires consent of both the military judge *and* the government; Rule for Courts-Martial 903 does not. Congress deliberately chose not to involve the convening authority in this decision to avoid the "possibility of undue prejudicial command influence."<sup>35</sup>

#### *B. Presentencing Hearing.*

Pre-sentencing hearings are governed by Rules for Courts-Martial 1001 through 1011. The general procedures permits the government to present its case in aggravation through documents and live witnesses, subject to cross-examination. The defense is then permitted to offer evidence of extenuating and mitigating circumstances, likewise through documentary evidence and the testimony of live witnesses. The accused may make a sworn statement subject to cross-examination, or an unsworn statement subject only to rebuttal.<sup>36</sup> Rebuttal and surrebuttal may follow at the discretion of the military judge. After counsel present their respective arguments on sentencing, the members are instructed by the military judge before they close to deliberate.

With respect to the government's case in aggravation, the only evidence that must be presented to the sentencing body is the pay and service data of the accused and the duration and nature of any pretrial restraint listed on the charge sheet.<sup>37</sup> Whether any other evidence is offered in aggravation is left to the discretion of the trial counsel. Provided he can satisfy the admissibility requirements, the trial counsel may offer personnel records,<sup>38</sup> evidence of prior convictions,<sup>39</sup> evidence in aggravation,<sup>40</sup> and

opinion evidence regarding the duty performance and rehabilitation potential of the accused.<sup>41</sup>

The accused may then present rebuttal evidence and other matters in extenuation and mitigation.<sup>42</sup> Or he may choose, for various reasons, to remain silent and offer no evidence on sentencing. Since nothing is required from the accused and very little of the government during pre-sentencing, it is not unusual for the sentencing body to know very little about the accused when they begin their sentencing deliberations. This lack of information about the accused is perhaps the biggest criticism of our current sentencing procedures.

The lack of detailed sentencing instructions for court members is another aspect of court-martial sentencing subject to criticism. The only instructions the military judge is required to give the members include: (1) guidance on the maximum punishment; (2) procedures for deliberation and voting; (3) advice that they are solely responsible for adjudging an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and (4) instruction that they should consider all matters in extenuation and mitigation and aggravation.<sup>43</sup>

The Benchbook provides additional guidance to military judges regarding supplemental instructions judges should give members, such as describing the different punishments, advising the members that "no punishment" is an option, that a guilty plea is a matter in mitigation and may be the first step towards rehabilitation, an explanation of sworn versus unsworn statements, and that the accused will be given credit for pretrial



confinement.<sup>44</sup> The military judge is also given the discretion to decide whether to instruct the members on the accused's mendacity,<sup>45</sup> and other matters raised by the particular facts of a case,<sup>46</sup> or specifically requested by the trial counsel, defense counsel, or the members.<sup>47</sup> Most military judges conclude their instructions with the following general guidance regarding the overall goals of sentencing:

In accordance with your best judgement based upon the evidence that has been presented in this case, your own experiences and general background, you should select a sentence which best serves the ends of good order and discipline in the military, the needs of the accused, and the welfare of society."<sup>48</sup>

### III. Origins of Current Military Sentencing Procedures.

Our federal, state and military criminal justice systems all developed during a period in history when the public feared the threat of oppressive, foreign appointed judges presiding over criminal trials.<sup>49</sup> In light of this fear, one of the earliest criminal procedures developed was protection of the right to trial by a jury of ones peers.<sup>50</sup> Another factor contributing to the popularity of trial by jury was the fact there were very few trained jurists, and thus little perceived difference between a judge and a lay jury.<sup>51</sup> One might have expected that these circumstances would have led to the adoption of jury sentencing as well, but that was not the case. The federal government and the vast majority of states all adopted the British tradition of mandatory judge sentencing.<sup>52</sup> In

similar fashion, the American military looked to the British Army for guidance, and adopted their practice of having the court-martial adjudge the sentence as well as determining guilt.<sup>53</sup>

#### *A. Early History of Military Justice.*

Most military legal scholars agree that the origins of American military justice can be traced to The Code of Articles promulgated in 1621 by Swedish general Gustavus Adolphus.<sup>54</sup>

General Adolphus was the first commander to appoint a judge advocate to his staff. He also developed a two tier system of courts-martials very similar to our current general and special courts-martials.<sup>55</sup> Sentencing in these early courts-martial was performed by the members, who had absolute discretion unless the punishment was fixed by decree.<sup>56</sup>

The American Army's first formal code -- the American Articles of War of 1775 - closely mirrored the British Code which had evolved from the code of General Adolphus.<sup>57</sup> Like the British and Swedish codes, sentencing was the duty of the members.<sup>58</sup> With the exception of a few offenses, the members were given complete discretion regarding the punishment to be adjudged.<sup>59</sup> Unfortunately, the members usually had access to very little information about the accused upon which to exercise their abundant discretion. Since the Articles of War of 1775 did not provide a separate sentencing hearing, the sentence was based solely on the evidence presented on the merits.<sup>60</sup>

The Articles of War of 1775 were modified in 1776 by Thomas Jefferson, John Adams and three others. Notable changes included: an increase in the mandatory sentences for several offenses; authorizing death as a punishment for more offenses; precluding execution of sentences until a report was made to Congress, the General, or Commander-in-Chief; and providing for a second court-martial based on vexatious appeals.<sup>61</sup> The Articles were amended again in 1786 to require the Secretary of War's approval for any sentence that included death or dismissal of an officer. All other punishments could be approved by the appointing authority.<sup>62</sup>

The American Articles of War of 1806 created the new offenses of disrespect to the President, Vice President, or Congress, and absence without leave as we know it today. Death could only be adjudged by a general court-martial, and required concurrence of two-thirds of the members.

One of the most significant changes made with respect to sentencing was the 1890 amendment to the Articles of War of 1874, which severely curtailed court-members' discretion during sentencing. No longer could punishment "in time of peace, be in excess of a limit which the President may prescribe."<sup>63</sup> A table of maximum punishments was published a year later.<sup>64</sup>

During these early years of military justice, members had very little evidence upon which to adjudge an appropriate sentence. There was no sentencing hearing,<sup>65</sup> evidence of prior convictions were strictly limited,<sup>66</sup> and evidence in extenuation and mitigation could not be offered unless it was relevant to the merits.<sup>67</sup> Consequently, the

sentences adjudged under these procedures emphasized uniformity and retribution as the attention was focused on the offense, and not the individual offender.<sup>68</sup>

Although given practically complete discretion with respect to sentencing from the very beginning, it was not until the 1917 *Manual for Courts-Martial* that members were given any kind of guidance regarding the ends to which they should apply their discretion. The 1917 *Manual* contained detailed information about the Disciplinary Barracks at Fort Leavenworth, Kansas, the new policy permitting suspension of the punitive discharge for purely military offenses and returning to duty those soldiers successfully rehabilitated,<sup>69</sup> and numerous other factors that might effect the type and amount of punishment adjudged.<sup>70</sup> Thus began the long, slow trend towards individualized sentences that focused less on the offense and more on the offender. Although members were now expected to focus more on the individual, the sentencing procedures continued to provide them little access to information about the defendant.

The 1921 *Manual* attempted to fill this void by permitting the members to consider the statement of service on the first page of the charge sheet.<sup>71</sup> This contained data on the accused's current enlistment, age, pay rate, allotments, prior service, character of any prior discharges, and date on any pretrial restraint. The 1928 *Manual*, likewise, provided additional guidance to the members on what they might consider,<sup>72</sup> but again failed to provide the members meaningful guidance on what the sentence should hope to achieve.<sup>73</sup>

One other notable characteristic of the early military practice is that the decisions of courts-martial, with the exception of jurisdictional issues, could not be modified or set aside by the Judge Advocate General.<sup>74</sup> The appointing authority had absolute discretion to act on the findings and sentence. By custom of service he could return an acquittal or lenient sentence to the court-martial for reconsideration with a view towards greater punishment.<sup>75</sup>

#### *B. Post WWI Developments in Military Justice.*

Following World War I, the military justice system, like the rest of the military, was subject to a significant after action review. The post-WWI changes to military justice grew out of the historic *Crowder-Ansell* disputes.<sup>76</sup> In 1917, several enlisted soldiers assigned to Fort Bliss, Texas refused to attend a drill formation. They were court-martialed and sentenced to a dishonorable discharge and confinement ranging from 10 to 25 years. After the appointing authority ordered the sentence executed, the record of proceedings were forwarded to the Office of the Judge Advocate General for review.<sup>77</sup> The cases were forwarded to Brigadier General Samuel T. Ansell, the acting Judge Advocate General<sup>78</sup> for review. General Ansell directed that the findings be set aside for legal error. He was of the opinion that his powers of review authorized him to modify or set aside findings and sentence for lack of jurisdiction or for serious prejudicial error.<sup>79</sup> This was a radical departure from views held by former Judge Advocates General.

Major General Crowder opposed General Ansell's position. He believed that JAG review was simply advisory except for jurisdictional matters.<sup>80</sup> The War Department ultimately adopted Major General Crowder's view.<sup>81</sup> In the end, however, the debate shifted to Congress which eventually adopted several of General Ansell's proposals in the 1920 Articles of War.<sup>82</sup> Several other proposals of Brigadier General Ansell were eventually approved by Congress.<sup>83</sup>

### *C. Post WWII Developments in Military Justice.*

During World War II, over sixteen million men and women served in the Armed Forces. Approximately two million courts-martial were convened, one for every eight servicemembers. An average of sixty convictions were returned for every day the war was fought.<sup>84</sup> Consequently, several soldiers left the military with a very poor view of military justice.<sup>85</sup> The heavy caseload and unfair treatment received by numerous soldiers during World War II demonstrated the competing interests of military justice during time of war. On the one hand, the military must have the means to enforce discipline on a large scale during hostile operations. Balanced against this is the competing interest of insuring the legal rights of the individual soldier are not abused.<sup>86</sup>

The post World War II review resulted in drastic changes to military justice. The 1951 Uniform Code of Military Justice (Code) brought all four services under one code; established the Court of Military Appeals;<sup>87</sup> guaranteed the accused the right to remain silent;<sup>88</sup> prohibited double jeopardy;<sup>89</sup> and guaranteed soldiers the right to counsel.<sup>90</sup>

But by far the most significant change made to military justice was the creation of the *law officer* -- an attorney who would be responsible for the fair and orderly conduct of the proceedings in accordance with the law.<sup>91</sup> The law officer would sit apart from the court-martial members,<sup>92</sup> instruct them on the applicable law, and make interlocutory rulings.<sup>93</sup> During congressional hearings, Professor Edmund Morgan advised Congress that the law officer "will now act solely as a judge and not as a member of the court, which becomes much like a civilian jury" and that "the law officer now becomes more nearly an impartial judge in the manner of civilian courts."<sup>94</sup>

The 1951 *Manual* also codified the adversarial pre-sentencing hearing. The prosecution and defense were now permitted to present "appropriate matter to aid the court in determining the kind and amount of punishment to be imposed."<sup>95</sup> As before, members were advised of the service data on the charge sheet and evidence of prior convictions. However, in guilty pleas, the trial counsel could now offer evidence in aggravation of the offense, subject to defense counsel cross-examination and rebuttal.<sup>96</sup> The 1951 *Manual* also allowed the accused to make an unsworn statement, and enabled the law officer to relax the rules of evidence for the accused's presentation of extenuating and mitigating evidence.<sup>97</sup>

The 1951 *Manual* also contained additional guidance on what matters the members could consider during sentencing deliberations.<sup>98</sup> They were cautioned to adjudge the maximum sentence only in the most aggravated cases or instances of prior convictions. Members were encouraged to adjudge uniform sentences for similar

offenses with the understanding that the special needs of the local community might justify a more severe punishment. Members were not to rely on higher authority to mitigate a sentence, but they were to keep in mind the effects a light sentence might have on the local community's perception of the military in those cases that could also be tried in civilian courts.<sup>99</sup> Finally, the manual included discussions on when the two types of punitive discharge would be appropriate elements of the sentence.<sup>100</sup>

*D. Post Vietnam War Developments in Military Justice.*

Criticism of military justice during the Vietnam War prompted Congress to enact the most sweeping changes yet made to military justice. The Military Justice Act of 1968 created the military judge, and provided soldiers the option to be tried and sentenced by a military judge sitting alone without members.<sup>101</sup> The creation of an independent trial judiciary was designed to give military judges the same functions and powers of their civilian counterparts.<sup>102</sup>

Pre-sentencing procedures were changed to permit argument by counsel, and admission of the entire "personnel records" of an accused as opposed to just their "service record."<sup>103</sup> Members were no longer instructed on the need for uniform sentences, or the effect of light sentences on the reputation of the armed forces. In effect, the goal was to give members even greater discretion in adjudging an appropriate sentence.<sup>104</sup>



To assist military judges with their newly created authority and responsibility, the Army published the Military Judges Benchbook.<sup>105</sup> This provided a detailed script for judges and counsel to follow during both the merits and sentencing portions of the court-martial, along with sample instructions for trials with members.<sup>106</sup>

Several provisions of the 1968 Military Justice Act simply codified earlier judicial opinions reached by the Court of Military Appeals between 1951 and 1968. In *United States v. Mamaluy*,<sup>107</sup> the Court of Military Appeals held that the members were not to consider sentences in similar cases despite the language of paragraph 76a encouraging uniform sentences.<sup>108</sup> Similarly, in *United States v. Rinehart*,<sup>109</sup> the Court eliminated the long-standing military practice of permitting the members to consult the Manual for Courts-Martial during deliberations, and emphasized that the sole source of instruction on the law would be the law officer.<sup>110</sup>

The Court of Military Appeals attempted to further relax the rules of evidence during sentencing in hopes of expanding the information that could be presented to the sentencing body.<sup>111</sup> Unfortunately for trial counsel, these rules were rarely relaxed for the government.<sup>112</sup> Evidence in aggravation remained limited to evidence related to the offense, and not the offender.<sup>113</sup> The reluctance to relax the rules for the government extended into post-trial matters in *United States v. Hill*,<sup>114</sup> where the Court condemned the government practice of gathering evidence of the defendant's background for the convening authority to consider through post-trial interviews of defendants.

As noted above, after 1917, the goal of sentencing gradually began to focus on individualized sentences and rehabilitation of the individual offender as opposed to retribution for the offense and general deterrence. In *United States v. Burfield*,<sup>115</sup> the Court ordered a new sentencing hearing when the trial judge refused to allow a defense psychiatrist to testify that the defendant was unlikely to repeat his offense. The Court held that this was precisely the type of evidence that should be considered during sentencing.<sup>116</sup> This emphasis on individualized sentences and rehabilitation reached its zenith in a shortlived opinion from Judge Fletcher in *United States v. Mosely*.<sup>117</sup> In *Mosely*, Judge Fletcher went so far as to find that general deterrence was not a proper matter for consideration during sentencing. Fortunately for the government, *Mosely* was rarely enforce and ultimately overruled in *United States v. Lania*.<sup>118</sup>

The 1981 amendments to the 1969 *Manual for Courts-Martial*, and the emergence of Chief Judge Robinson Everett on the Court of Military Appeals vastly improved the government's position with respect to sentencing. In *United States v. Vickers*,<sup>119</sup> the Court affirmed the Navy court's decision reversing the fifty year old practice that prohibited evidence in aggravation when an accused pleaded guilty. The Court recognized that evidence such as rape trauma syndrome is highly relevant to determining the appropriate sentence. The Manual was revised to allow the military judge to relax the rules of evidence for the government, albeit only during rebuttal of defense evidence.<sup>120</sup> In *United States v. Mack*,<sup>121</sup> Chief Judge Everett expanded the admissibility of records of non-judicial punishment. Although he was convinced in *Mack* that members could properly evaluate the weight to be given records of non-judicial punishment, Chief Judge Everett later concurred in Judge Fletcher's opinion in *United*

*States v. Boles*<sup>122</sup> that not all evidence in an accused's military records was admissible, essentially because members can not be trusted to properly use this type of information.<sup>123</sup>

The intent behind the sentencing changes in the 1984 Manual was to remove control of the proceedings from the hands of the defense.<sup>124</sup> The 1984 *Manual* greatly increased the amount of evidence the government could offer on sentencing during its case-in-chief. The government could now offer opinion evidence regarding the accused's rehabilitation potential regardless of whether or not the accused had previously opened the door.<sup>125</sup> However, all was not lost for the defense. Specific acts were still limited to cross-examination.<sup>126</sup> Aggravation evidence relating to the defendant was limited to rebuttal.<sup>127</sup> Only matters related to the offense such as victim impact, and adverse effects on the mission, discipline, or the command were admissible.<sup>128</sup> For the first time in history the members were allowed to consider the fact the defendant pleaded guilty.<sup>129</sup> Finally, the burden for post-trial review was switched from the Staff Judge Advocate to the defense.<sup>130</sup>

The purpose of this brief history is to demonstrate how sentencing procedures in the military have changed over the years.<sup>131</sup> In its infancy, the purpose of military sentencing was retribution for the offense and the procedures reflected this purpose by limiting the evidence on sentencing to that which was presented on the merits. Our current sentencing procedures are concerned with far more than just retribution. They have been modified accordingly, to provide greater access to information about the offense and the offender in order to adjudge a sentence that takes into account all of

the additional purposes behind military sentencing. But each increase in permissible sentencing evidence is accompanied by a related increase in risk that the members will not know how to factor this evidence into their sentencing deliberations. Sentencing is no longer the one-dimensional process it used to be. It is a very complicated process that requires training and experience in both the law and the principles of sentencing, training and experience that members sorely lack, and military judge possess.

#### *IV. Comparison of Federal and State Sentencing Procedures.*

Although there are numerous theories on the origin of the jury system, one common belief is that it was brought to England in 1066 during the Norman invasion.<sup>132</sup> The first juries were actually the precursor to our modern grand jury.<sup>133</sup> The trials themselves were conducted not in a court of law, but by ordeal<sup>134</sup>, wager of law,<sup>135</sup> or by battle.<sup>136</sup> Although there was certainly little need for sentencing after trials of this nature, trials eventually moved into the courtroom, and the English common law developed the practice of having the trial judge decide the sentence in criminal trials.<sup>137</sup>

In colonial America, drafters of federal and state constitutions were determined to protect the right of an accused to be tried by a jury of his peers.<sup>138</sup> Although the Constitution and Bill of Rights specifically provided for the right to trial by jury, they did not provide a constitutional right to be punished by a jury of one's peers.<sup>139</sup> The sole purpose for providing the right to trial by jury was to protect the accused from unwarranted punishment.<sup>140</sup> But once found guilty by a jury of ones peers, the only

constitutional protection regarding the punishment is that it not be "cruel and unusual."<sup>141</sup>

The vast majority of states have adopted the practice of mandatory judge sentencing. This was not always the case, as several states preferred jury sentencing. At one time, jury sentencing, in one form or another, was practiced in thirteen states.<sup>142</sup> This number has declined to only eight states,<sup>143</sup> out of a growing recognition that the circumstances that may have justified them at one time no longer exist.<sup>144</sup>

Tremendous diversity exists among these eight states regarding both the amount of discretion afforded the jury, and the circumstances under which the jury will determine the sentence. In Mississippi, the jury may determine punishment for only two crimes -- carnal knowledge and rape. If the defendant pleads guilty then the trial judge decides the sentence.<sup>145</sup> In Kentucky, the jury decides the sentence in those cases where the jury determines guilt, unless the punishment is fixed by the law.<sup>146</sup>

In Arkansas, the jury determines the sentence unless: (1) the defendant pleads guilty; (2) the defendant elects trial by judge alone; (2) the jury fails to agree on punishment; or (4) the prosecution and defense agree that the judge will fix the sentence.<sup>147</sup>

The practice in Missouri is for the judge to instruct the jury on the range of permissible punishment, but if the defendant requests in writing, or is a prior, persistent, or dangerous offender, then the judge assesses punishment. The judge will also assess

punishment if the jury cannot agree. Even in those cases where the jury deliberates on a sentence, it is the judge who ultimately decides the actual sentence, with the limitation that he cannot exceed the sentence adjudged by the members unless their sentence is below the mandatory minimum.<sup>148</sup>

In Oklahoma, the defendant must make a specific request to have the jury decide his punishment. The Oklahoma code sets limits within which the adjudged sentence must fall. If the jury fails to agree on the sentence, then the judge will decide the sentence for them.<sup>149</sup>

In Texas, the judge is charged with determining the sentence unless the offense is one for which the jury can recommend probation, or the defendant requests in writing, before voir dire, that the jury decide the sentence. In those instances where the jury does decide the sentence, the Texas code provides detailed guidance on the instructions to be given the members regarding parole and good time.<sup>150</sup>

Tennessee, on the other hand, has the jury decide the maximum and minimum sentence range within which the judge must determine the actual sentence. Except for the offenses of second degree murder, rape, carnal knowledge, assault and battery with intent to commit carnal knowledge, armed robbery, kidnapping for ransom, or any class X felony, the jury shall affix a determinate sentence.<sup>151</sup>

The Commonwealth of Virginia is the lone holdout remaining most true to jury sentencing.<sup>152</sup> Yet even in Virginia, jury sentencing is limited to only those cases tried

on the merits before a jury. As one might suspect, the right to trial by judge alone requires the consent of the trial judge and the prosecutor.<sup>153</sup> In those cases decided by a jury, the Virginia code sets limits within which the jury's sentence must fall. Their sentence is then subject to the review of the trial judge who has the power to suspend it.<sup>154</sup> The Virginia procedure has been criticized by legal scholars for years.<sup>155</sup> But perhaps the most telling criticism is demonstrated by the fact criminal defendants in Virginia are systematically being forced to forfeit their right to a jury trial in order to avoid being sentenced by juries that have demonstrated a tendency to sentence much more severely.<sup>156</sup>

#### V. Consequences of Current Sentencing Procedures.

An understanding of the proper purposes and goals of sentencing is necessary before the success or failure of current military sentencing procedures can be evaluated. Should the goal of military sentencing be uniform sentences, lenient sentences, sentences that maintain discipline, or sentences that focus on the offender as opposed to the offense? The only constitutional restriction with respect to criminal punishments is that they not be "cruel and unusual."<sup>157</sup> The *Manual's* only concern is that the sentence be "appropriate."<sup>158</sup>

On the one hand is the view that the predominant concern in sentencing should be its effect on discipline and the ability of the military to accomplish its mission.<sup>159</sup> On the other, is the view that the sentence of a court-martial is not an expression of the will of command, but a judgement of a court of the United States that must, therefore,

provide fairness and due process to the accused.<sup>160</sup> The true answer to these competing viewpoints most likely lies somewhere between these two opposing views.<sup>161</sup>

In order to determine the full ramification of our sentencing procedures, its beneficial to consider its impact on all of the affected parties. Consequently, the analysis will review our sentencing procedures from the perspective of the accused, the government/trial counsel, commanders/court-members, military judges, and the general public.<sup>162</sup>

In order to gain insight into the current attitudes and opinions of those affected by the sentencing process, surveys were sent to prisoners at the Disciplinary Barracks at Fort Leavenworth, Kansas, convening authorities, staff judge advocates, military judges, defense counsel, and senior commanders attending the Senior Officer Legal Orientation (SOLO) Course at the Judge Advocate General's School in Charlottesville, Virginia.<sup>163</sup> References to responses from this survey along with a survey conducted by the 1983 Advisory Commission to the Military Justice Act of 1983<sup>164</sup> will be made throughout the remaining text.

#### *A. The Accused*

A soldier pending court-martial benefits from the current sentencing procedures in several ways. Most importantly, he has a choice between sentencing by members and sentencing by judge alone. Depending on the circumstances of his case and the advice of counsel, the accused will normally select the forum most likely to adjudge the most



lenient sentence.<sup>165</sup> It also improves the morale of soldiers when they know they have choices should they ever find themselves before a courts-martial. Giving soldiers the option also creates an appearance of fairness to the public at large.<sup>166</sup> The right to be tried and sentenced by members also provides the accused a valuable bargaining chip during pretrial negotiations with the convening authority.<sup>167</sup>

The downside for the accused is that the military judge may deny the request for trial by military judge alone.<sup>168</sup> Another significant drawback for the accused occurs when the accused perceives that members will sentence him more harshly than a judge. In order to avoid being sentenced by these members, the defendant must forfeit his right to be tried by them on the merits.<sup>169</sup> Although the odds favor contesting a case before members, it is not uncommon for defense counsel to encourage defendants to be tried on the merits before a military judge alone, based on the more favorable sentencing prospects he presents.<sup>170</sup>

Moreover, in light of the fact that two out of every three court-martials are tried by military judge alone,<sup>171</sup> it is arguable that the choice of being sentenced by members is simply not that important to the accused.<sup>172</sup>

#### *B. Government/Trial Counsel*

Retaining the current sentencing procedure that gives the defendant the option to be sentenced by court-members offers no significant benefits to the government.

1. *Administrative Burden.* Sentencing by members creates an enormous administrative burden on the government in the form of both the administrative difficulties associated with securing the attendance of members at trial and the corresponding disruption to military training caused by their absence from their regular duties.<sup>173</sup> The driving force behind the change to the 1969 *Manual* permitting the accused to elect to be tried by military judge alone was to reduce these burdens. Eliminating this option will extend these manpower savings even further.<sup>174</sup>

2. *Forum Shopping.* Giving an accused the option to be tried by judge or members inevitably leads to "forum shopping". Soldiers facing trial will undoubtedly select members in only those cases in which they feel they will receive a more lenient sentence.<sup>175</sup> Former Chief Judge Cedarburg, United States Coast Guard, offered the following comment during his testimony before the 1983 Advisory Committee:

I know that there are judges who hammer and there are other judges who are lenient; but I also know that the hammers under the present system don't get a chance to sentence because they [the accused] don't go before them. They choose the trial by members.<sup>176</sup>

3. *Disparate Sentences.* Member sentencing also lends itself to much more unpredictable results, on both the high and low ends of the sentencing spectrum.<sup>177</sup> From the government's perspective, this can be either good or bad, assuming a stiff sentence is considered good for the government, and a lenient sentence is considered

bad. But not all disparate results are an indication of unfairness to the accused.<sup>178</sup>

Several survey responses indicated that sentence disparity may be justified by the fact that different commands focus on different aspects of a crime, or that the effect of a crime may differ depending on the units mission (e.g. TRADOC posts more severe on fraternization and sexual offenses than FORSCOM installations; 82d Airborne Division "ready brigades" more harsh on sentence than garrison units at XVIII Airborne Corps at Fort Bragg).

Excessive results, be they high or low, are detrimental to the government from the standpoint of their effects on soldiers' perception of the overall fairness of the system. If the sentence is unduly harsh, soldiers (and the general public for that matter) will consider it a bad system corrupted by command influence.<sup>179</sup> On the other hand, an unduly lenient sentence (e.g. retention of a barracks thief) can have devastating effects on unit morale and discipline. Unusually lenient sentences pose the greatest danger to military discipline since there is no post-trial remedy available to correct the injustice done to the military.<sup>180</sup> If, on the other hand, an unduly harsh sentence is adjudged, the convening authority, or courts of military review can reduce an accused's sentence.<sup>181</sup> Although it is possible that military judges might announce an irrationally low sentence, it is not as likely, as statistics indicate that judges are far less likely to adjudge aberrant sentences on either the high or low end.<sup>182</sup>

*4. Unpredictable Results.* Parties in both surveys overwhelmingly agreed that court-members are more unpredictable with respect to sentencing. Judges, be they more harsh, or lenient,<sup>183</sup> have a much better history of adjudging sentences within a certain

range of reason. Some defense counsel do not like this tendency of military judges to be more uniform during sentencing, because they lose the opportunity to gain their client an unusually lenient sentence.<sup>184</sup> But from the government's perspective, it's much better for the military to have a system that is inclined to give more uniform sentences than one that promotes unpredictable results.

5. *Appellate Error.* Member sentencing creates a much greater risk of appellate error.<sup>185</sup> Critics of judge alone sentencing in the 1983 Advisory Committee felt this was not a significant concern since it was their impression there were few complex legal issues addressed during sentencing, so only a minimal number of legal errors would be prevented, and that most sentencing errors could be cured by sentence reassessment by the Court of Military Review.<sup>186</sup> One need only look to the index of any recent Military Justice Reporter under *rehabilitation potential* or *uncharged misconduct*, to discover the tremendous volume of appellate litigation generated by errors during sentencing.<sup>187</sup> Moreover, the fact we have Courts of Military Review and convening authorities to provide relief for sentencing errors, is a poor excuse for maintaining a sentencing forum option that is far more prone to making such errors.<sup>188</sup>

6. *Safeguards Against Command Influence.* In order to preserve the military tradition of member sentencing, and at the same time protect soldiers from being sentenced by panel members who may be unlawfully influenced by commanders and the convening authority that selected them,<sup>189</sup> Congress and the President have had to continually monitor and update procedural safeguards designed to reduce the possibilities of unlawful command influence.

Article 25 of the UCMJ is intended to ensure that convening authorities select only the "best qualified" personnel to sit as court members. It also requires that the court members be from a unit different from the accused,<sup>190</sup> and senior in grade<sup>191</sup>. The court-martial panel is often referred to as a "blue ribbon panel,"<sup>192</sup> hand-picked by the convening authority. But the high standards of Article 25 are not always achieved. Sometimes convening authorities intentionally or unintentionally select members on the basis of their expendability from regular duties.<sup>193</sup> Counsel who have tried cases in busy jurisdictions are well aware how often members are excused for field training exercises and other important military duties. There are virtually no restrictions on the convening authority's discretion to excuse members.<sup>194</sup> In fact, this authority may be delegated to the staff judge advocate, legal officer, or principal assistant.<sup>195</sup>

The disparity in the amounts of time convening authorities spend selecting court members is another area of concern. The amount ranged anywhere from thirty minutes to several days.<sup>196</sup> Those who spent little time selecting members often commented that they rely on their subordinates to prepare a list of nominees. *United States v. Hilow*,<sup>197</sup> demonstrated the risks associated with this practice. Although the convening authority in *Hilow* properly applied Article 25 criteria, it did not cure the taint of an misguided assistant adjutant who prepared the list of nominees with what he perceived to be people who were *hard-liners* on discipline.

Article 37 of the *Code* is designed to prevent commanders from reprimanding court-martial personnel or otherwise trying to influence court-members or convening

authorities with respect to judicial activities.<sup>198</sup> Article 98 of the *Code*<sup>199</sup> was designed to be the hammer behind Articles 37 and 25. Article 98 provides punitive sanctions for anyone convicted of unlawful command influence. To date however, there is not one reported case of conviction under this article. Nevertheless, appellate courts continue to report cases of unlawful command influence.<sup>200</sup> Eliminating members for sentencing will significantly concerns associated with unlawful command influence.<sup>201</sup>

7. *Evidentiary Safeguards.* One of the military judge's responsibilities is to consider evidence on motions and objections that may later be determined to be inadmissible. Judges are trusted to disregard such evidence and ultimately render a fair and impartial decision based only on admissible evidence.<sup>202</sup> Because lay court-members are untrained in the law however, the Military Rules of Evidence severely limit the evidence they may be exposed to. Consequently, the government's ability to offer substantial evidence about the accused or the offense is often frustrated and the resultant sentence is based upon little or no information about the accused or the offense.<sup>203</sup>

Moreover, it is the accused and not the government who controls the amount and type of evidence to be introduced regarding his background and character. If the accused has a bad record, he can keep this from the members by not opening the door to his character. Conversely, if he has a solid background, the defense can parade in all kinds of evidence in extenuation and mitigation.

In *United States v. Boles*,<sup>204</sup> the Court of Military Appeals observed that the military's sentencing procedural rules were not as broad as those in federal district

courts. The Court recognized that this may have something to do with the fact court-members adjudge sentences at courts-martial as opposed to judges in the federal system. The susceptibility of lay court-members requires the military judge to assume a proactive role to protect members from evidence that may "unduly arouse the members' hostility or prejudice against an accused."<sup>205</sup>

Moreover, due to the members' inexperience in evaluating evidence, relevant evidence that is otherwise admissible on sentencing, must be excluded because its prejudicial impact outweighs its probative value.<sup>206</sup> In fact, the task of determining relevant sentencing evidence has become so confusing that appellate court judges have taken to discouraging trial counsel from pushing the limit until "the dust settles a bit and the rules become more clear."<sup>207</sup>

### *C. Commanders/Court Members*

From the command's viewpoint, member sentencing offers the following advantages: (1) members provide a highly educated *blue ribbon panel* that knows the needs of the military; (2) members provide valuable community input into what is needed for discipline; (3) member sentencing provides valuable training for young soldiers; and (4) member sentencing is a highly valued military tradition. On the downside, member sentencing creates the following problems for commanders: (1) it disrupts unit training and mission requirements while commanders and senior noncommissioned officers are away from their normal duties; 2 members are untrained to perform the sentencing function; (3) it promotes compromise verdicts, and (4) it

causes undue reliance on convening authorities and appellate courts to correct inappropriate sentences.

*1. Court Members Are a Blue Ribbon Panel.*

We have a habit ... of loosely referring to a court-martial panel as the jury.... [I]t is not a jury; [i]t was never designed to be a jury... [I]t was designed to be a blue ribbon panel. They were to be picked because of their expertise and their knowledge. They wanted ... the people who were mature; the people who knew how to make decisions; the people who were aware of the military requirements.... [T]hey represent the decision-making level of the Army.... [W]e teach them something about military justice; they know the situation in the Army."<sup>208</sup>

That member sentencing has survived to this date is attributable to the quality and integrity of the officers and enlisted personnel who serve as members.<sup>209</sup> The problem with member sentencing lies not with the integrity of the members, but with asking them to perform a duty they know little if anything about.<sup>210</sup>

Nonlegal military commanders are distinctly inferior to legal personnel insofar as the technical ability needed for the proper administration of a system of criminal justice is concerned, just as they are inferior (as are lawyers) to



physicians in terms of medical knowledge. Lawyers are ill-equipped to direct air strikes against enemy targets, lead troops into battle, or engage in any of the myriad other functions ... Military commanders, in like fashion, are not trained to perform brain surgery upon military patients in military hospitals. And military commanders are not professionally competent to administer criminal justice.<sup>211</sup>

Even if we presume that the convening authority always selected the "best qualified" people to serve as court members, this would still not overcome the fact they are untrained and uneducated in the principles of sentencing.

*2. Members Provide Valuable Community Input Needed to Determine an Appropriate Sentence.* This was the reason most commonly offered for maintaining court-member sentencing.<sup>212</sup> Several commanders and staff judge advocates remarked that since court-members live and work in the community affected by the offense they are better able to determine the type and amount of punishment appropriate for the particular offense. Others commented that the military judge is too far removed from the military community to understand the ramifications his sentence will have on discipline within the unit and the community.<sup>213</sup> Three of fifteen military judges surveyed agreed that they try to balance the sentences they adjudge against those adjudged by members in similar cases.<sup>214</sup> Respondents in favor of member sentencing also argue that the judgement of several members with different points of view and

experiences is more likely to result in a more fair sentence than that adjudged by a military judge sitting alone.<sup>215</sup>

When the charged offenses involved are uniquely military (e.g. absence without authority, disrespect, failure to obey a lawful order), or have a direct impact on the military, there is more of an argument to be made on behalf of the community input court-members bring to the sentencing process. But as the scope of military jurisdiction has expanded to cover more cases only tangentially related to the military solely by virtue of the offender's status as a soldier,<sup>216</sup> the unique experiences and training of military court-members loses its relevance.

The original intent of Congress was that courts-martials would be courts of very limited jurisdiction over only military offenses.<sup>217</sup> When this was the practice, member sentencing made good sense. The court-members were well suited to determine the appropriate punishment for the average private disobeying a lawful general order. But now that courts-martial have jurisdiction over practically every offense committed by a service member, court-member sentencing does not appear as sensible. Far more than the effect on the military must be considered in arriving at an appropriate sentence for a soldier on leave who abuses his nephew while on vacation in Mexico.

Rather than attempt to fashion a system that permits members to punish military offenses, and judges punish all others, its more effective and efficient to have the military judge do it for all offenses. It is much easier for a single military judge to be

trained on the effect crimes have on the military community than to try to train new court-members for every new case.

Whatever advantage members may bring to the system by serving as the "conscience of the community", their influence has declined over the years for several reasons. The first reason is due to the decrease in the number of cases in which an accused elects to be tried and sentenced by members.<sup>218</sup> Second, practically all parties involved in military justice remarked that members are more likely to adjudge disproportionately higher and lower sentences than are military judges.<sup>219</sup> This being the common perception associated with member sentencing, how much value does member "input" actually offer our system of justice?<sup>220</sup> Finally, the ability of the members to provide the community's assessment of the punishment necessary for a particular offense is indirectly controlled by the military judge and the decisions he makes regarding the type and amount of evidence the members may consider during deliberations.

*3. Member Sentencing Helps Train Future Leaders.* This is one of the more common reasons offered in support of member sentencing.<sup>221</sup> Lieutenant General John Galvin testifying before the 1983 Advisory Committee, stated that "the fundamental fairness which is characteristic of the military justice system is instilled in court-members and they carry that concept with them from the courtroom."<sup>222</sup> Colonel Crouch, felt that it prepared members for "all kinds of leadership positions."<sup>223</sup>

Although development of junior leaders is an admirable goal, *training* them in a forum that is to decide whether a soldier should be punitively discharged and how long

they should be confined in prison is grossly unfair to the military accused. Unlike most other military training, a court-martial is at best, a "live fire" exercise, at worst, "actual combat", as far as the attorneys, judge, and the accused are concerned. The courtroom was never intended to be a training ground for junior officers.

Command influence issues aside, numerous appellate court decisions indicate that convening authorities are often reluctant to select junior members to serve on court-martial panels since they lack the proper age, experience, length of service, and judicial temperament.<sup>224</sup> Article 25 of the UCMJ encourages this practice. Ultimately, most convening authorities select those officers and senior noncommissioned officers to serve as members who have already demonstrated their decision-making and leadership abilities.<sup>225</sup> Finally, whatever training benefits may result from court-martial duty can just as well be achieved through participation in just the merits phase of the court-martial.

*4. Military Tradition.* As noted earlier, the tradition of court-member sentencing is tied to the very origins of the military court-martial.<sup>226</sup> It's understandable that commanders are reluctant to surrender control over what they perceive to be a unique need of the military community.<sup>227</sup> They feel that it is the responsibility of the commander to establish the moral and professional tone of the unit.<sup>228</sup> Despite these feelings, the fact remains that preserving an historical tradition for the sake of tradition, does not justify continuation of an antiquated sentencing practice.

The professed sincerity of the command's commitment to member sentencing is not supported by their actions. The radical change in the 1968 Military Justice Act that gave the accused the option to be tried and sentenced by military judge alone was "vigorously supported" by the Armed Forces.<sup>229</sup> In the 1983 survey, convening authorities agreed that eliminating members from sentencing would not deprive the command of important powers.<sup>230</sup> Although some senior commanders have expressed their willingness to bear the administrative burdens of court-martial duties as an inherent part of their overall command responsibility,<sup>231</sup> one need only consider the frequency with which requests for excusal occur whenever a member is due to participate in a field training exercise or other important military operation. The proposal currently being evaluated by the working group to the Joint Service Committee on Military Justice to completely eliminate court members from straight special courts-martials during combat, is indicative of how sincere commanders are about the professed importance of court-martial duty compared to their principle military responsibilities.<sup>232</sup>

Furthermore, the military *tradition* of court-member sentencing bears little resemblance to its original beginnings. Starting in 1948, with the introduction of enlisted members on the panel, and again in 1968, by giving the accused the option to be sentenced by military judge alone, the role of court-members has changed so drastically that it is hardly worthy of being characterized as a *tradition* any longer.<sup>233</sup> Especially when one considers that it is the accused<sup>234</sup> -- not the convening authority or commanders -- who controls whether or not members will participate in the court-martial.<sup>235</sup> How important can this tradition be if the military continues to willingly surrender it to the whim of the accused?<sup>236</sup>

Finally, one cannot help but think, based upon comments from both surveys, that commanders and convening authorities are of the mindset that being sentenced by ones military peers is the "honorable" thing to do. Thirteen of twenty-five SOLO course attendees stated that they would choose to be sentenced by members regardless of the nature of the charges.<sup>237</sup> Major General Sennewald summed up this perception before the 1983 commission with the following comment:

[I]t has to do with the soldier ... committing an act, found guilty, and [being] sentenced by people who he sees and works with and deals with, being sentenced by the [command] chain, being sentenced by the institution as opposed to a judge alone who is ... someone he can't identify with as well. ... It's the relationship, essentially it's a senior group, well senior to him obviously, enlisted if he so desires, who are now being involved in controlling ... that person's fate as opposed again to the judge [who] ... does not have that same relationship.<sup>238</sup>

Although such sentiment is popular with commanders and senior noncommissioned officers, its of minimal concern to the typical junior or mid-level soldier facing punishment under the UCMJ. His concern is that he be sentenced by a fair and properly trained sentencing body.

5. *Mission Disruption.* Any system of justice adopted by Congress and the President must be able to function both in time of war and time of peace.<sup>239</sup> From the command's point of view, disruption to the mission is one of the biggest drawbacks to member participation in courts-martials. Disruption is magnified during periods of armed conflict. The problems concerning defense counsel tactics in Desert Storm<sup>240</sup> demonstrate how giving soldiers the option to request trial by members can cause tremendous problems in a combat environment.

Though the right to trial by jury does not apply to the military<sup>241</sup> it is nevertheless a nationally respected and expected right that is not likely to be eliminated any time soon, even in the military.<sup>242</sup> Jury sentencing, on the other hand, is not as universally accepted and is not protected under our Constitution.<sup>243</sup> Consequently, there is no underlying legal or popular basis to support a soldier's interest in court-member sentencing other than military tradition. Comparing the interests of the command to be prepared to fight a war, against the interests of the accused to choose a sentencing forum that he thinks will result in the lesser sentence clearly weighs in favor of the needs of the military.

6. *Members are Untrained in the Science of Sentencing.*

[E]ven the most experienced trial jurist in the civilian community will describe the sentencing process as the aspect of the criminal trial which taxes his or her judicial abilities to the limit. [T]he military justice system ... [continues] to

permit this function to be exercised ... by the court-martial members, if the accused desires. ... [We] simply cannot leave the task to amateurs. Indeed, this is especially true in the military where the deterrent effect of a sentence may have a direct affect on the maintenance of the discipline of a combat unit.<sup>244</sup>

No one can question the integrity and motivation of the officers and enlisted personnel selected to serve as court members. Nevertheless, they are simply out of their element when it comes to adjudging appropriate sentences for court-martials. Of the five purposes of sentencing listed in the Military Judges Benchbook,<sup>245</sup> the only area in which members might possibly have an advantage over a military judge is in assessing the effects the sentence may have on unit discipline.<sup>246</sup> But adjudication of an appropriate sentence requires more than understanding its potential effect on unit discipline.

[T]he determination of an appropriate sentence turns on more than the degree of moral approbation which the offense commands. In the military context, it also requires more than evaluation of the effect of the offense on discipline within the local command. "An enlightened sentencing decision today calls for a sophisticated and informed judgment which takes into account a vast range of additional factors, from the likelihood that the defendant will



commit other crimes to the types of programs and facilities which may induce a change in the pattern activity which led to the offense."<sup>247</sup>

The military judge is at a decided advantage with respect to evaluating these additional factors necessary for determining an appropriate sentence. The military judge is a trained jurist, certified by The Judge Advocate General.<sup>248</sup> Military judges traditionally have extensive experience as both a trial and defense counsel before taking a seat on the bench. Judges attend an annual three week Military Judges course at the Army Judge Advocate General's School to develop and refine the skills necessary to serve as a military judge. Of course, not all trial judges are equally capable. Some may not be as experienced or as knowledgeable as others, and some will hand down an occasional inappropriate sentence. But the answer to this problem does not lie in retaining the power in an even less qualified panel of lay court-members.<sup>249</sup>

Members, on the other hand, have little or no formal training in military justice in general, sentencing in particular.<sup>250</sup> In fact, prospective court-members with any kind of law-related training or background, such as military police and inspectors general, are often challenged for cause precisely because of this background.<sup>251</sup> In light of the differences in training and experience, judges are much better qualified to adjudge a sentence that best serves the "needs of the community, the accused, and the army".<sup>252</sup>

Numerous appellate court decisions regarding the admissibility of sentencing evidence have turned on the members' unfamiliarity with the intricacies of sentencing.<sup>253</sup>

In *United States v. Hill*,<sup>254</sup> the Court recognized that the problem with military sentencing is that members do the sentencing and cannot be trusted to properly evaluate all of the evidence that might otherwise be relevant and admissible on sentencing. As a consequence, it is necessary to limit the evidence to which they may be exposed. In *United States v. Boles*,<sup>255</sup> the Court ordered a rehearing on sentence after the military judge erroneously admitted a letter of reprimand during the sentencing phase of the court-martial.<sup>256</sup> The Court concluded that the appellant was prejudiced because trial counsel's inflammatory argument confused the members regarding their duties during sentencing.

In *United States v. Montgomery*,<sup>257</sup> the Court affirmed the practice that permitted military judges to consider "any personnel" records of the accused, but limited members to only information from those records "which reflects the past conduct and performance of the accused."<sup>258</sup> The stated intent of this practice was to broaden the information available to the sentencing body. Apparently, this was only applicable to military judges. *Montgomery* provides one of the clearest demonstrations of the differences between a military judge and lay court-members with respect to sentencing. The *Montgomery* Court presumed that the military judge could distinguish between material and immaterial evidence contained in the personnel records and base his decision on only the former,<sup>259</sup> whereas members had to have this issue decided for them by the military judge.

The fact the military judge is the presiding officer<sup>260</sup> who rules on all motions,<sup>261</sup> and objections<sup>262</sup> is further evidence of his superior training and skill in the law. To reduce the risks of members hearing potentially inadmissible evidence, the military judge

conducts such motions out of their presence.<sup>263</sup> When ruling on motions and objections, the military judge is not bound by the rules of evidence, save those related to privileged communications.<sup>264</sup>

Prior to 1957, members had been permitted to consider the *Manual* during deliberations. This process was first criticized by the Court of Military Appeals in *United States v. Boswell*,<sup>265</sup> and later prohibited in *United States v. Rinehart*.<sup>266</sup> In *Rinehart*, the trial counsel directed the members' attention to provisions of the *Manual* regarding the Army policy on discharging thieves. During deliberations the members "discovered" two other provisions in the *Manual* that generated requests for further guidance from the law officer.<sup>267</sup> These queries from the members prompted the Court to conclude that trial counsel's tactics caused a "virtual race to the manual" during deliberations despite full and adequate instructions from the law officer.

We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the *Manual*, indiscriminately rejecting and applying a myriad of principles -- judicial and otherwise -- contained therein. The consequences that flow from such a situation are manifold.

... It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer.

... [T]he great majority of court members are untrained in the law. A treatise on the law in the hands of a nonlawyer

creates a situation which is fraught with potential harm,  
especially when one's life and liberty hang in the balance.<sup>268</sup>

#### *7. Evidence of Aggravation and Rehabilitation Potential.*

The endless amount of appellate litigation concerning evidence of rehabilitation potential and aggravation provides recent examples of court-members' limitations during sentencing.<sup>269</sup> Even when evidence of this nature is otherwise relevant and admissible, the military judge must apply a balancing test to ensure the probative value is not substantially outweighed by the danger that the evidence will cause unfair prejudice, confuse the issues, or mislead the members.<sup>270</sup> If the balance weighs in favor of unfair prejudice, the members will be deprived of relevant evidence that is often important to determining an appropriate sentence.<sup>271</sup> The military judge has also stepped in to serve as referee between the government and defense regarding inadmissible aggravation evidence the government wants to include in the stipulation of fact as part of the pretrial agreement between the accused and the convening authority.<sup>272</sup>

*8. Collateral Consequences.* Awareness of the collateral consequences of a court-martial sentence is yet another area where court-members lag far behind the military judge. In *United States v. Griffin*,<sup>273</sup> the Court affirmed the general rule that "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration."<sup>274</sup> This may deprive the accused of the opportunity to present important evidence to the members.<sup>275</sup> For example, members may be permitted to hear testimony about a rehabilitative program for sex offenders at the

United States Disciplinary Barracks, but then not be informed of the sentence length necessary for the defendant to be incarcerated there.<sup>276</sup>

Judges, on the other hand, are cognizant of the administrative consequences of their sentences and are permitted to consider this knowledge in arriving at a proper sentence.

Among the objects of punishment is rehabilitation, and parole is one of the correctional tools utilized to facilitate rehabilitation of prisoners. Thus in seeking to arrive at an appropriate sentence, Judge Wold properly took into account the rules governing parole eligibility. Indeed, military judges can best perform their sentencing duties if they are aware of the directives and policies concerning good-conduct time, parole, eligibility for parole, retraining programs, and the like.<sup>277</sup>

Further complicating the problems of collateral consequences is the convening authority's power to consider these factors during his post-trial review.<sup>278</sup> If such information is appropriate for the convening authority to consider in deciding whether or not to approve a sentence, it should also be considered by the sentencing body, who assesses the sentence in the first place. The fact court-members are instructed not to consider these important consequences is but another reason to eliminate them from the sentencing process.

9. *Members Create Risk of Compromise Verdicts.* Compromise verdicts can occur under two different circumstances. In the first instance, if the members cannot agree on findings, they might agree to adjudge a lighter sentence in return for a concession on guilt. It can also work in reverse, with the members agreeing to acquit the accused of some charges or to convict him of a lesser offense, with the understanding that they will impose a sentence more severe than might otherwise be imposed for the lesser offense.<sup>279</sup> The significance of compromise verdicts cannot be overemphasized; they strike at the cornerstone of our criminal justice system -- that guilt be proven *beyond a reasonable doubt*.<sup>280</sup>

Although the majority surveyed in 1983, believed compromise verdicts occur on only an "infrequent basis"<sup>281</sup> the fact they occur at all is reason enough to eliminate a practice that increases the risks that verdicts of this nature will be reached.

10. *Undue Reliance on Convening Authority and Courts of Military Review to Correct Erroneous Sentences.*

The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased.<sup>282</sup>

The respective Courts of Military Review have similar powers of review under article 66 of the UCMJ.<sup>283</sup>

Reliance on the convening authority's clemency powers to correct errors and mitigate sentences can be traced to the original Articles of War of 1775.<sup>284</sup> During these early years of military justice the convening authority was the only one who had access to any evidence about the defendant that might be relevant to an appropriate sentence.

Although much of the information that was once exclusively reserved for the convening authority's consideration is now available to the members, there is still ample information that he may consider that is not disclosed to the members.<sup>285</sup> Appellate courts have relied on these post-trial powers of the convening authority and courts of review as an excuse to continue a sentencing procedure that exposes itself to unnecessary risks of error.<sup>286</sup> In *United States v. Warren*,<sup>287</sup> the Court of Military Appeals, though noting the increased risk of error that results from permitting members to consider an accused's perjury during trial, felt that it was neutralized by the unique sentence review available in military justice.

The convening authority -- who often will have been provided extensive information about an accused -- and the Court of Military Review, can grant relief by reducing the sentence if it appears that excessive weight was given by the sentencing authority to the accused's mendacity.<sup>288</sup>

The fallacy of this practice is readily apparent. Why rely on the convening authority or a Court of Military Review to determine whether a particular sentence is appropriate or lawful, when they have never seen or heard the accused in person and must rely on a written record of trial?<sup>289</sup> Why not permit the body who is actually deliberating on the sentence have access to at least as much information as the body that will ultimately review their decision? As Brigadier General Ansell noted many years ago, "[s]urely we need not point out to a lawyer that clemency, even when generously granted, is a poor remedy in the case of a soldier who should not have been convicted [or sentenced] at all."<sup>290</sup>

Appellate review of an excessive sentence provides the accused a woefully inadequate remedy. Many soldiers wrongfully or excessively confined will have already served their period of confinement by the time their case is reviewed on appeal.<sup>291</sup> Moreover, there is nothing the convening authority and courts of review can do to remedy the inappropriately lenient sentence which may have a greater impact on unit morale and discipline.<sup>292</sup>

*11. Members are Unduly Influenced by Emotion.* All the parties involved in military justice shared revealed the common belief that the sentences of military judges are more consistent because they are not swayed by the emotional aspects of a case.<sup>293</sup> Judges, have "heard it all before", and are not as easily impressed by argument, or influenced by a particularly aggravated offense as are members seeing or hearing such evidence for the first time. This tendency of human nature to "toughen up" after



repeated exposure to certain behavior is confirmed by the comments of two staff judge advocates and one SOLO course attendee that panels tend to become more harsh the longer they sit.<sup>294</sup> Responses from defense counsel indicate that they prefer a fresh panel as opposed to one that is near the end of its term.<sup>295</sup>

From the defendant's perspective, the impact emotion may have on an accused's sentence can be good or bad, depending upon the direction in which the flames are fanned. But in the end, justice is much better served when emotion is left at the doorsteps to the deliberation room.

#### *D. The Judiciary*

##### *1. Member Sentences Provide Judges a Basis for Comparison.*

One of the arguments offered in favor of member sentencing is that court-member sentences serve as a benchmark for military judges during their sentencing deliberations.<sup>296</sup> However, as previously noted, it is widely recognized that member participation in sentencing is sporadic (less than one-third)<sup>297</sup> and the sentences they adjudge are often on either the high or low end of the spectrum. Member sentences may well be a factor for military judges to consider in fashioning their sentence, but certainly no more so than a sentence reached by a fellow member of the bench.

*2. Member Sentencing Requires Jury Instructions.* When an accused selects members for sentencing, the military judge is placed on the proverbial *horns of a dilemma*. It is generally recognized that the sentencing body needs as much information as

possible to adjudge an appropriate sentence.<sup>298</sup> But members are untrained and inexperienced and are often unable to understand and properly consider much of the evidence that is relevant to sentencing. Consequently, the judge is faced with either excluding otherwise relevant evidence, or admitting it and then trying to fashion proper instructions to ensure the evidence is properly considered by the members.<sup>299</sup> Although the former may result in a "cleaner" record on appeal, it may also result in an incomplete picture for sentencing. The latter option, though painting a more accurate and complete picture for sentencing, also increases the risk of appellate error.

A hotly contested presentencing hearing before members is like walking through a minefield for the military judge. The sentencing phase is filled with appellate landmines waiting to be tripped by the slightest misstep of the military judge. There are few roadsigns to guide judges through this minefield. The only instructions required by the *Manual* are that the members be advised (1) of the maximum punishment, (2) proper deliberation procedures, (3) that they should consider all evidence in aggravation and extenuation and mitigation, and (4) that they are not to rely on the possibility of mitigating action by the convening or higher authority.<sup>300</sup> Fortunately, military judges can turn to the Benchbook for guidance on additional instructions if the need arises (e.g. effects of guilty plea, explanation of sworn versus unsworn statement by the accused).<sup>301</sup> The judge may elect to summarize the evidence in aggravation and mitigation.<sup>302</sup> He may also choose to instruct members on collateral consequences, provided the accused consents.<sup>303</sup> But military judges venturing off the beaten path of sentencing instructions often find themselves challenged on appeal.<sup>304</sup>

Appellate review of jury instructions regarding rehabilitation potential demonstrate the tightrope judges must walk with respect to crafting their sentencing instructions. In *Warren*,<sup>305</sup> the Court of Military Appeals offered the following "guidance" for judges to follow when instructing members on the effect an accused's mendacity may have on rehabilitation potential:

Finally, the members should be alerted that this factor may be considered by them only insofar as they conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. They may not mete out additional punishment for the false testimony itself. This distinction is a real one and it must be clearly drawn by the military judge in his instructions and morally adhered to by the individual members when voting on the sentence.<sup>306</sup>

Despite the Court's best intentions, *Warren* confused this area of the law even more. If a defendant lacks rehabilitation potential, does that mean his sentence should be longer or that he should be discharged?

The Court attempted to clarify this issue in *United States v. Aurich*,<sup>307</sup> by finding that rehabilitation potential is a mitigating factor and that lack of such potential is not an aggravating factor.<sup>308</sup> Rather than settle the matter, *Aurich*, simply created a new issue whether evidence of rehabilitation potential could be offered in the government's

case in chief on sentencing, or only in rebuttal.<sup>309</sup> No doubt the existing body of law regarding evidence of rehabilitation potential is in a complete state of confusion.

Before deciding how to instruct court-members on discretionary issues, the judge must first decide whether there is a need for instructions. In *Warren*, the Court cautioned military judges about giving any instructions *sua sponte* or over defense objection.<sup>310</sup> Trial judges should also exercise caution regarding other curative instructions that may only serve to highlight or reinforce evidence that members are instructed not to consider.<sup>311</sup>

The bottom line is that sentencing with court-members requires instructions. Instructions require the military judge to put his thought process on the record. The more his thoughts are on the record, the more likely and easily they are challenged on appeal. Judge alone sentencing leaves no such paper trail, and is therefore much less likely to be challenged on appeal. Even when they are, appellate courts are much more inclined to give the military judge the benefit of the doubt and presume he knew the law and properly applied it.<sup>312</sup>

#### *E. Public Perception*

A judicial system operates effectively only with public confidence -- and, naturally that trust exists only if there also exists a belief that triers of fact act fairly.<sup>313</sup>

On the positive side, the public sees that a soldier facing courts-martial has the choice of being tried and sentenced by court-members or a military judge.<sup>314</sup> The only reason the public sees this in a positive light is because of the reputation courts-martial have for being hand-picked by the convening authority for the purpose of adjudging severe punishment.<sup>315</sup> Giving the accused the choice to be sentence instead by a military judge is favorably viewed by the public because it gives the accused the ability to avoid being tried and sentenced by these members. It would be far better for the public image of military justice if we eliminated court-members altogether.

Eliminating members from sentencing will not provide an overnight cure for the general public's perception of military justice. But it will improve the military's image when the public sees that soldiers are no longer faced with the prospect of being sentenced by commanders and senior noncommissioned officers perceived to be tough on discipline and less prone to mercy.

## VI. Consequences of Change to Mandatory Judge Alone Sentencing

As in the previous section, the consequences will be analyzed in terms of their effects on the key players involved in military justice: the accused, the government/trial counsel, commanders/court members, judges, and the general public.

### *A. The Accused*

With mandatory judge alone sentencing, defendants would no longer need to concern themselves with the potential sentencing consequences of their decision to be

tried on the merits before the military judge or court-members.<sup>316</sup> Ironically, this may result in more contested trials before members than we see today, since defendants will no longer face the fear of a severe sentence from members who may find them guilty.<sup>317</sup> Although this may reduce the savings in manpower and administrative costs originally viewed as a potential benefit from mandatory judge alone sentencing, it is nevertheless a change well worth the additional cost. Now, the accused's choice of forum will concern itself with the more important and constitutionally protected issue of guilt or innocence, as opposed to the potential severity of the sentence.

A related benefit to the accused is the realization that sentences will be more consistent.<sup>318</sup> If nothing else, this may relieve some of the accused's pre-trial anxiety. Having a better idea of the range within which the sentence is likely to fall may encourage accuseds to contest charges they might otherwise plead guilty to since they no longer need the safety net of a pretrial agreement to protect them from the much more unpredictable sentences members are prone to adjudge. Knowing that there is relative certainty as to the sentence that might be adjudged will also provide counsel and the accused firmer ground from which to enter pretrial negotiations.

The accused will also stand to benefit from being sentenced by a jurist who is trained in law and penology.<sup>319</sup> Even if we were to assume that members know more about the effects of a sentence on discipline in the community,<sup>320</sup> there are several other factors that must be fed in to the equation to reach an appropriate sentence. Military judges are far more qualified to assess these factors than lay court members. Moreover,

by making this the sole responsibility of judges they will continue to develop these skills at an even faster pace, as they perform the function more frequently.

One drawback for the accused is the loss of perhaps his biggest bargaining chip in pretrial negotiations. Forty-five of the sixty-eight staff judges advocates agreed that waiver of trial or sentencing by members often had a significant effect on pretrial negotiations.<sup>321</sup> Over half of the defense counsel surveyed indicated they were successful in obtaining a better pretrial agreement for their client by offering to waive sentencing by the members.<sup>322</sup> But accuseds will not necessarily have to come to the bargaining table empty handed. The government's biggest interest in pretrial negotiations is the guilty plea itself.<sup>323</sup> Since there may be a greater inclination for accuseds to demand trial on the merits before members --since they need no longer fear the possibility of a severe sentence from members -- the government may be more inclined to enter a favorable pretrial agreement afterall.

The most adverse consequence for the accused is the loss of the option to choose the forum for sentencing that is likely to adjudge the more lenient sentence.<sup>324</sup> But the accused does not have a constitutional right to be sentenced by members.<sup>325</sup> Consequently, there is no reason for the military to continue to protect a sentencing procedure that effectively issues the accused a silver platter upon which to have the members serve him a lenient sentence.

Finally, the military may be overestimating the importance of protecting the defendant's forum options. All parties surveyed in 1983, except defense counsel, agreed that eliminating the choice would not deprive the accused of a substantial benefit.<sup>326</sup>

#### *B. Government/Trial Counsel*

Mandatory judge alone sentencing benefits the government in numerous ways. The risks of appellate error<sup>327</sup> and command influence<sup>328</sup> would be significantly reduced. Compromise verdicts would virtually disappear.<sup>329</sup> Sentences would be more uniform and based upon a more complete picture of the offender.<sup>330</sup> Finally, the accuseds would no longer be able to "forum shop" for a more lenient sentence.<sup>331</sup> Without members, the rules of evidence could be fully relaxed for both the government and defense, thereby permitting the trial counsel to offer more relevant evidence about sentencing without having to "pigeon hole" it to fit one of the specific categories listed in Rule for Courts-Martial 1001.

It's uncertain how mandatory judge alone sentencing will effect the administrative burden associated with court members. On the one hand, members time away from regular duties will be reduced by the amount of time normally spent on sentencing. This may not be much of a savings, since the members will have to be present for the merits regardless. The biggest savings would be in guilty pleas, where members would no longer be involved at all. However, the ultimate impact may actually be more trials on the merits before members since the defendant no longer faces the prospect of a severe sentence if convicted by a panel. But the advantage to the government is that the



accused's forum selection will be free from the interference of sentencing considerations.<sup>332</sup>

### *C. Commanders/Court Members*

The most significant advantage for court-members is that they will no longer be asked to do a job they are unqualified to perform. Although convening authorities and SOLO course overwhelmingly felt they had sufficient understanding of the principles of sentencing to determine an appropriate sentence, judges and attorneys felt otherwise.<sup>333</sup>

Although officer and enlisted court-members may not be spared the burden of court-martial duty as much as originally hoped, the additional time spent by members deciding guilt or innocence will be far more meaningful than that currently spent attempting to perform the sentencing function of which they know little about.

Furthermore, the time and effort court-members put in to sentencing often ends up a waste of time. An accused who pleads guilty under current procedures can still demand sentencing by members. If the accused has the benefit of a pretrial agreement with a sentence limitation, the sentence adjudged by the members is a nullity, except from the standpoint of the occasional accused who happens to "beat the deal".<sup>334</sup> But members who sincerely deliberate on what they perceive to be a fair and just sentence, only to later discover that their sentence was reduced by the terms of a pretrial agreement, will feel as though they have wasted their time,<sup>335</sup> and lose respect for the system.

Commanders also stand to benefit from more consistent results, since they are the ones who must deal with the consequences an unduly harsh or lenient sentence may have on morale and discipline within the unit.

Commanders will be deprived of the perceived benefit of offering their input on the type and amount of punishment necessary to maintain discipline in the military. However, the importance of this input was not supported by the 1983 Advisory Committee Survey. All groups agreed that mandatory judge alone sentencing would not deprive the command of important powers.<sup>336</sup> But convening authorities and the Army staff judge advocates did agree that it would "appear" that command authority had diminished.<sup>337</sup> Upon closer scrutiny, the relative unimportance of command input is not surprising. After all, member participation is controlled by the accused, who selects members only when it is perceived to be in his best interests.

Commanders need not worry that their input on discipline will no longer play a role in courts-martial sentencing. Their opinions regarding the "significant adverse impact on the mission, discipline or efficiency of the command directly and immediately resulting from the accused's offense" can still be offered by the trial counsel during the sentencing phase of the trial.<sup>338</sup> Trial counsel can also include the command's opinion in his sentencing argument to the military judge.<sup>339</sup>

Finally, the vast majority of day to day discipline in the military occurs outside the court-room, and is taken care of within the unit through training, leadership,

counseling, and the administration of nonjudicial punishment under article 15 of the UCMJ.<sup>340</sup>

#### *D. The Judiciary*

Military judges stand to benefit the most from mandatory judge alone sentencing. There will no longer be a need for confusing instructions on the procedures and purposes of sentencing.<sup>341</sup> Fewer instructions will reduce the number of appellate issues. Those issues that are raised will rarely result in prejudicial error, since judges are presumed to have disregarded inadmissible evidence and relied on only evidence properly before the court.<sup>342</sup>

Eliminating members will rid the military of the need to maintain artificial evidentiary procedures. Pre-sentencing hearings would no longer be a matter of gamesmanship between counsel arguing whether certain evidence directly relates to the charged offense, or is unfairly prejudicial to the accused. Defense counsel will not have to decide whether to "open the door" to certain evidence, since it will always be open under the simple rule of relevance. With judge alone sentencing, the rules of evidence could be completely relaxed to admit as much evidence as possible about the offense and the offender without the fear that it will be misused or confuse the issues. The sentencing hearing could then be guided by a simple rule of relevance.<sup>343</sup>

Access to additional information about the offense and the offender is more important in the military than in the civilian jurisdictions because of the variety of

punishments permissible under the Uniform Code. In addition to fines and confinement, which can be adjudged in state and federal criminal trials, a military court-martial must consider the appropriateness of a punitive discharge, restriction, hard labor without confinement, forfeiture of pay, a reduction in grade, or a reprimand.<sup>344</sup>

With mandatory judge alone sentencing, every court-martial sentence would be determined by a military judge fully versed in the collateral consequences of his decision. No longer will we see sentences from members that include confinement for twelve months and 68 days in a feeble attempt to account for the administrative consequences of a court-martial sentence.<sup>345</sup>

There will be fewer instances of unlawful command influence since judges are better insulated from the influence of command.<sup>346</sup> The military judge is not rated by the convening authority, or anyone else involved in the military justice system.<sup>347</sup> Even within the Judge Advocate General's Corps, the judiciary is treated as a separate division.<sup>348</sup>

One further advantage of mandatory judge alone sentencing is that sentences will be less influenced by emotion and argument of counsel.<sup>349</sup> Judges are jurists, trained to minimize the role emotion may play during sentencing deliberations. Judges have also seen and heard it all before and are therefore less inclined to be as swayed by inflammatory arguments and heinous crimes as are members seeing and hearing such events for the first time.

The lone drawback to mandatory judge alone sentencing is the loss of member sentences as a check against which military judges can balance their sentences.<sup>350</sup> This loss is insignificant when one considers how few sentences are currently adjudged by members, and the fact that most judges state they are not affected by this information.<sup>351</sup> A related concern is that military judges given exclusive control over sentencing will abuse their discretion and adjudge unduly harsh or severe sentences.<sup>352</sup> In the unlikely event this should ever occur, the convening authority and courts of review have the authority to grant clemency or correct what they find to be an excessively severe sentence.<sup>353</sup> In fact, the convening authority's clemency power may fill the void caused by the loss of community input from member sentencing. He can reduce any sentence he feels is excessive, thereby communicating to the judge the command's perspective on the amount of punishment a particular offense warrants.

#### *E. Public Perception*

The code is not military jargon. The code has got to be completely understood by the average man on the streets of the United States of America. And so that's why I say, and you see it in my questionnaire, that given the exigencies of military service, we have to approach the daily run of the mill American system of justice as closely as we can.<sup>354</sup>

Mandatory judge alone sentencing will undoubtedly improve the public's perception of the military justice system. The public will observe a system of military

justice that continues to more closely resemble the criminal justice system which with the vast majority of our citizens are familiar.<sup>355</sup>

No longer will the punishment phase of courts-martial practice be perceived as controlled by overzealous commanders bent on severe punishment. They'll hear about fewer cases of disparate sentences. If they look closely they will see a sentencing procedure that permits the military judge to take a complete look at the offender's duty performance and civilian background -- tested for reliability by our adversarial sentencing hearing<sup>356</sup> -- prior to deliberating on an appropriate sentence. The public will also see a system in which an accused need not forfeit his right to trial by jury in order to avoid being sentenced by the ominous court-martial panel. Public approval of military justice is critical to its overall success. Eliminating members from the sentencing process will significantly reduce this particular criticism of military justice.

## VII. Conclusion.

Court-member sentencing is a long standing military tradition. It has been a part of military justice since the origins of the American military itself. When the jurisdiction of courts-martials were limited to military offenses and other offenses directly impacting upon military discipline and readiness, and the general focus of sentencing was simply retribution for the offense as opposed to an individualized sentence tailored to the particular offender, there was little need for a highly trained sentencing body, and court-members were capable of performing the task.

But with the expanding jurisdiction of military courts-martials over practically all offenses committed by a soldier, and the increasing popularity of individualized sentences, that focus on more than just rehabilitation, the sentencing function has developed into a drastically more complicated process. As the goals of sentencing expand to include discipline, individual and general deterrence, and rehabilitation of the individual offender, additional information about the defendant and crime becomes necessary to accomplish these goals. As the amount of information about the offense and offender increases, so too does the risk that lay court-members, untrained in the laws and principles of sentencing, will be unduly prejudiced by what they hear, or will not know how to properly account for such information during their sentencing deliberations.

In a vain attempt to compensate for court-members' deficiencies, Congress, through the *Uniform Code of Military Justice*, the President, through the *Manual for Courts-Martial*, and our military appellate courts, through their published opinions, have continually made piecemeal changes to sentencing procedures in order protect military defendants from being unfairly sentenced by members who know nothing about the principles of sentencing. A much more effective solution is to eliminate court-members from the sentencing process altogether and turn it over exclusively to military judges who are fully trained to perform this complex task.

Having risen from the status of "court judge advocate" to "law officer" and finally to military judge," the authority of the military judge has grown to where the judge is now the focal point of the military courts-martial. This heightened status of the military

judge is apparent, not only in the eyes of the Congress, the President and the military appellate courts, who helped place him in this position, but also in the eyes of the vast majority of soldiers who prefer to be tried and sentenced by a military judge.

Even if we were to disregard the fact that all of the tangential issues related to sentencing favor the military judge over lay court-members (e.g. appellate issues, sentence disparity, instructions, administrative burdens, compromise verdicts, command influence), the simple fact remains -- court- members are unqualified to perform the sentencing function -- military judges are. Since 1969, when first given the shared responsibility of courts-martial sentencing, military judges have proven their mettle, and should be the exclusive sentencing body under the UCMJ.<sup>357</sup>



1. The military's procedures for capital sentencing are beyond the scope of this thesis, other than to observe that the decision whether to sentence an accused to death is a matter far too grave to place upon the shoulders of one person, no matter how well trained they may be in the science of sentencing. Consequently, this proposal to adopt mandatory military judge alone sentencing would exclude capital cases.
2. Charles W. Webster, *Jury Sentencing -- Grab-Bag Justice*, 14 SW. L.J. 227 (1960).
3. Russel W.G. Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, ARMY LAW., Jul. 1988 at 28, n. 23 (citing testimony of Major General Kenneth J. Hodson before the 1983 Advisory Commission to the 1983 Military Justice Act).
4. Thesis Survey . See *infra* note 163 explaining the survey conducted in support of this thesis.
5. E.A.L., *Jury Sentencing in Virginia*, 53 VA. L. REV. 991 (1967).
6. *Giacco v. Pennsylvania*, 382 U.S. 339, 405 (1966) (Stewart, J. concurring).
7. Indiana, Montana, North Dakota, Georgia, and Alabama have all eliminated jury sentencing in non-capital criminal trials.

8. Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 23 (1967). One of General Ansell's numerous proposals was that the military "court judge advocate" would determine and impose an appropriate sentence. *See also* Robert D. Byers, *The Court-Martial as Sentencing Agency: Milestone or Millstone*, 41 MIL. L. REV. 105 (1968); M. Scott Magers, *The Military Sentencing Procedure - Time for a Change*, p. 72 (1974) (unpublished thesis, The Judge Advocate General's School).

9. Vol. I, *The Military Justice Act of 1983 Advisory Commission Report* at 61 [Hereinafter Adv. Comm. Rep.].

10. Craig Reese, *Jury Sentencing in Texas: Time for a Change?*, 31 S. TEX. L. REV. 331 (1990) (Sentencing is at once, the most critical and criticized phase of the criminal justice system); *See also* *United States v. DiFrancesco*, 449 U.S. 117, 149-50 (1980) (Brennan J., dissenting) (sentencing phase as critical as guilt-innocence phase); *Military Justice Act of 1983 Advisory Committee Survey* at 25 [hereinafter Adv. Comm. Survey] (60% of defense counsel believe sentencing considerations more important than findings with respect to selecting forum). *See infra* note 164 explaining the survey conducted by the Advisory Commission.

11. *See* U.S. CONST. art. III, § 2, cl. 3 ("The trial of all crimes, except in cases of impeachment, shall be by jury ...."); U.S. CONST. amend. VI ("In all criminal

prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ....").

12. U.S. CONST. amend. VIII.

13. MANUAL FOR COURTS-MARTIAL, United States, (1984) Chapter X, Sentencing.

14. *See* United States v. Boles, 11 M.J. 195, 198 (11 M.J. 195, 198 (C.M.A. 1981) ("[the President's] rules of sentencing procedure at courts-martial are still not as broad as those in operation in federal district courts. This may have something to do with the fact that members may sentence at court-martial while a judge sentences in federal district court.").

15. *See infra* notes 49-131 and accompanying text tracing the development of our current sentencing procedures.

16. *See* W. Winthrop, Military Law and Precedents, 444-46 2d ed. 1920) (Court-martial is a criminal judgment of a court of the United States, not an expression of the will of the command or its officers in disciplinary matters) *cited in* Adv. Comm. Rep. at 98. *See also* William C. Westmoreland, MILITARY JUSTICE - A COMMANDER'S VIEWPOINT, 10 AM. CRIM. L. REV. 21 (1971) (A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function it will promote discipline).

17. See Adv. Comm. Rep. *supra* note 9, at 36, (Testimony of Major General John Galvin that the "principle purpose of [military justice] is the maintenance of discipline on the battlefield"); Winthrop, *supra* note 16, at 49 (courts-martial "are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein"); Address by Colonel John H. Wigmore before the Maryland State Bar Association, 28 June 1919, printed in 24 MD. STATE BAR ASS'N TRANSACTION, 188 (1919) ("The prime object of military organization is Victory, not Justice.... If it can do justice to its men, well and good. But Justice is always secondary, and Victory is always primary), *cited in* Brown, *supra* note 8, at 13.

18. See Adv. Comm. Survey, *supra* note 10, at 21. Respondents were asked which sentencing authority had the most knowledge of the ramifications of sentences imposed and were given choices of "officer panels," "officer and enlisted panels," "military judges," and "all equally qualified." Convening authorities narrowly selected officer and enlisted panels (except Air Force convening authorities, who selected judges), with the other two selectors about even. All lawyer groups, however, overwhelmingly selected judges.

19. See Reese, *supra*, note 10, at 331.

20. Dep't of Army, Pamphlet No. 27-9, Military Judge's Benchbook, para. 2-59 (May 1982) (C1, 15 Feb. 1985) [hereinafter Benchbook].

21. See Reese, *supra* note 10, at 331.

22. See, Westmoreland, *supra* note 16, at 22. Military justice must provide a method for the rehabilitation of as many offenders as possible ... Because manpower is our most precious asset in the Army, conservation of human resources is of primary concern." Today we have such an abundance of good recruits there is no need to keep even the "smallest time" criminal.

23. See United States v. Motsinger, 34 MJ 253 (C.M.A. 1992) (president of special court-martial wrote letter to convening authority requesting suspension of bad-conduct discharge because it was adjudged out of "recognition of quality force and impending force drawdown requirements"). A prevalent thought among soldiers currently serving in the Army is that we now have a "zero defect" Army.

24. See Benchbook, *supra* note 20, para 2-59.

25. See *infra* note 244 and accompanying text discussing how difficult the sentencing function is for even the most trained jurist.

26. See E.A.L., *supra* note 5, at 969.

27. See MANUAL FOR COURTS-MARTIAL, United States, 1984 (R.C.M. 903 and 910) [hereinafter R.C.M.].

28. Nor can soldiers elect to have a military judge for the merits and members for sentencing.

29. Thirteen of fifty-four defense counsel volunteered this comment when asked what kind of advice they generally give their clients on the advantages and disadvantages of being tried and sentenced by judges versus members. Thesis Survey, *supra* note 163.

30. Adv. Comm. Survey, *supra* note 10, at 25. Sixty percent of defense counsels stated that sentencing considerations are much more important than findings in forum selection.

31. UCMJ art. 16; R.C.M. 903(b)(2). *See* United States v. Singer, 380 U.S. 24, 36 (1965) ("a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury").

32. *See* United States v. Sherrod, 26 M.J. 30 (C.M.A. 1980) (The military judge was challenged for cause because his daughter was friends with the victim of the charged offenses of indecent acts. The judge denied the challenge. Appellant nonetheless "felt so constrained to avoid court-martial with members that he requested trial by the very same judge." The military judge also denied this request out of concern that others might perceive bias on his part, and directed that appellant be tried by members. The

accused was subsequently sentenced to the "literal maximum punishment" by the members).

33. *Id.*

34. *United States v. Butler* 14 M.J. 72, 74 (C.M.A. 1982) (Everett, C.J. concurring).

Judge Everett also noted that "[i]n view of the Uniform Code's purpose of eliminating 'command influence' and concerning the professionalism in military justice, these reasons have the blessings of Congress." *Id.*

35. 14 M.J. at 78 (citing Senate Report No. 1601, 90th Cong., 2d Sess. (1968), reprinted in (1968) U.S. Code Cong. and Ad. News 4501, 4505-05).

36. R.C.M. 1001(c)(2).

37. R.C.M. 1001(b)(2).

38. R.C.M. 1001(b)(2).

39. R.C.M. 1001(b)(3).

40. R.C.M. 1001(b)(4).

41. R.C.M. 1001(b)(5).

42. R.C.M.1001(c). The military judge may relax the rules of evidence for the presentation of defense evidence. R.C.M. 1001(c)(3).

43. R.C.M. 1005(e). *See also* Benchbook, *supra*, note 20, para 2-37.

44. Benchbook, *supra* note 20, para. 2-37. Even though members are instructed on the duration and nature of pretrial confinement and that the defendant will receive credit, they are not told how to take it into account during sentencing deliberations. *See* United States v. Balboa, 33 M.J. 304, 307-08 (1991), where the members sentenced the accused to twelve months and 68 days, in their feeble attempt to compensate for the fact the accused was subject to 68 days of pretrial confinement. In his concurring opinion, Chief Judge Everett, remarked, "[t]his Court does not need a crystal ball to discern the real likelihood that as a practical result of the members' action appellant has been denied the legally required credit for his pretrial confinement." *Id.*

45. Benchbook, *supra* note 20, para. 2-60.

46. R.C.M. 1005(e)(4) discussion. The judge does so at his own risk. *See infra* notes 185-88 and 298-313 and accompanying text discussing risks of appellate issues created by military judge's sentencing instructions to the court-members.



47. R.C.M. 1005(b) and (c) (e.g. although members may recommend suspension or clemency of any portion of the sentence, the military judge is not required to instruct them on this matter unless one of the members happens to discover it and asks the military judge for guidance. *See* Benchbook, *supra* note 20, para. 2-54 and 2-55.

48. Benchbook, *supra* note 20, para 2-39. *See also* Grove, *supra* note 3, at 27:

The closest thing to a statement of sentencing policy in the MCM is in its preamble: 'The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and to thereby strengthen the national security of the United States.

49. Reese, *supra* note 10, at 325.

50. *Id.* note 16.

51. E.A.L. *supra* note 5, at 970.

52. *See infra* notes 138-156 and accompanying text discussing the federal and state sentencing procedures.

53. See Winthrop, *supra* note 16, at 21-24, *cited in* Adv. Comm. Rep. *supra* note 9, at 65.

54. *Code of Articles of King Gustavus Adolphus of Sweden*, reprinted in Winthrop, App. III, at 907-918, *cited in* Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment - A Short History of Military Justice*, 11 AF JAG L. REV. 213 (Spring 1969).

55. Anthony J. DeVico, *Evolution of Military Law*, 21 JAG. J. 64 (December 1966-January 1967).

56. Rollman, *supra* note 54, at 214 (e.g. threatening to strike a superior officer, "whether hee hit or misse" resulted in loss of the right hand. Other offenses were left to the discretion of the members "according to the importance of the Fact," or "what punishment they [Council of War] thinke convenient."

57. *Id.* at 215. George Washington was a member of the five man committee that drafted these articles. See Walter T. Cox III, *The Army, The Courts and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 5-6 (1987).

58. There was no one else to perform this task, since courts-martials were composed only of court-members at this time.

59. See Rollman, *supra* note 54, at 215. Punishments were generally prescribed in terms of "as a general or regimental court-martial might order," "according to the nature of the offense," or "in the court's discretion" (e.g. article IV, provided that: "[a]ny officer who shall behave himself with contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor, shall be punished according to the nature of the offense by the judgment of the general court-martial"). Examples of mandatory sentences included a fine of four shillings for cursing or swearing (art. III) and death for anyone shamefully abandoning their post (art. XXV).

60. See Winthrop, *supra* note 16, at 390-91. Even worse for the accused was the fact that evidence of good character and an exemplary military record was not admissible on the merits in most instances. In the event a guilty plea was entered, there was provision for the members to take evidence of the circumstances surrounding the offense, unless the specification was so descriptive as to disclose all the circumstances of mitigation or aggravation that accompanied the offense. See Ray, *Instructions for Courts-Martial and Judge Advocates*, 24 (1890) (citing Winthrop's Digest, p. 376), cited in Denise A. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, available in LEXIS, Nexis Library MLR file, pp. 109-110 n. 118 (1986).

61. Rollman, *supra* note 54, at 216 ("if upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the ... general court"). Benedict Arnold may have been one of the first soldiers

displeased with the results of his court-martial. It is reputed that one of the reasons leading to his decision to become a "turncoat" was his belief that he had been wronged by General Washington and Congress during his court-martial at Westpoint in 1780. Cox, *supra* note 57, at 6.

62. Rollman, *supra* note 54, at 217.

63. *Id.* at 218 citing (*Act of September 27, 1890, Ch. 998*.  
Reprinted in Winthrop, App. XIV, at 998.

64. *Id.* at 218.

65. *See infra* note 60.

66. Only courts-martial convictions were permitted, and they had to be "final". They also required formal proof by either the record of trial or authenticated copies of court-martial orders. *See* Vowell, *supra* note 60, at 26.

67. *Id.* at 26-27. Fortunately for the defendant, relevance was broadly construed and defendants were permitted to offer character evidence in mitigation on the merits.

At military law, evidence of character, which is always admissible, is comparatively seldom offered strictly or exclusively in defense; but, when introduced, is usually

intended partly or principally, as in mitigation of the punishment which may follow upon conviction.... It need have no reference to the nature of the charge, but may exhibit the reputation or record of the accused in the service, for efficiency, fidelity, subordination, temperance, courage, or any of the traits or habits that go to make the good officer or soldier. It also need not be limited to general character, but may include particular acts of good conduct, bravery, and c.

Winthrop, *supra* note 16, at 351-52.

Nevertheless, it should not go unrecognized that the original intent was that such matters as good character or an exemplary military record was to be considered by the reviewing authority and not the court-members. "Regularly, however, the same is rather ground for mitigation of punishment by the reviewing authority than for a milder judgement on the part of the court." *Id.* 396. *See infra* notes 282-92 and accompanying text discussing the dangers of relying on post-trial review to correct inappropriate sentences.

68. *See* Vowell, *supra* note 60, at 25.

69. MANUAL FOR COURTS-MARTIAL, United States (1917) para. 340 [hereinafter *Manual*]. The practice at this time was to permit the court-members to take the Manual with them into the deliberation room. *See* Vowell, *supra* note 60, at 29.

70. 1917 *Manual* para. 342:

In cases where the punishment is discretionary the best interest of service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon a soldier's self respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that

punishment of one kind would serve the ends of discipline,  
while in an other case punishment of a difference kind would  
be required.

*See Vowell, supra* note 60, at 29.

71. 1921 *Manual*, para. 271. This change, along with the existing practice of opening the court after findings to advise the members of prior courts-martial convictions were the genesis of our modern pre-sentencing hearings. *See Vowell, supra* note 60, at 31-32.

72. Members were advised that they should consider "the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof ..." 1928 *Manual*, para. 80. This same paragraph also advised members that a light sentence in cases triable by civilian courts might adversely affect the public's opinion of the Army. *See Vowell, supra* note 60, at-32.

73. "To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment." 1928 *Manual*, para. 80. Interestingly enough, paragraph 80 of the 1949 *Manual*, included an instruction to the members to consider the need to render uniform sentences for similar offenses throughout the Army. Unfortunately, it did not provide a mechanism whereby members could know what sentences were being adjudged for similar offenses.

74. Brown, *supra* note 8, at 29.

75. *Id.* at 28. This authority was repealed by Dep't of Army, Gen. Orders No. 88 (14 Jul. 1919).

76. *See generally* Brown, *supra* note 8, for an in-depth analysis of this tumultuous period in JAG Corps history.

77. *Id.* at 1. At approximately the same time, several black soldiers in Houston, Texas had been court-martialed for murder, mutiny and riot. They were convicted and then hanged two days after the completion of the courts-martial. The Office of the Judge Advocate General did not receive copies of the record of proceedings in these cases until four months after the sentences had been executed. *Id.*

78. Major General Enoch H. Crowder was filling the duty of Provost Marshall at the time. *Id.* at 2.

79. *Id.* at 4.

80. *Id.* at 5-6. *See also* Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1969).

81. A compromise of sorts was actually achieved through Dep't of Army Gen. Orders



No. 7 (7 Jan. 1918), which established boards of review to review all death sentences and those involving dismissal and dishonorable discharges prior to execution. Wiener, *supra* note 80, at 115.

82. See Brown, *supra* note 8, at 15-42 (e.g. staff judge advocate pretrial advice; appointment of military counsel, or civilian counsel of choice provided by the accused; selection of court-martial members "best qualified by reason of age, training, experience and judicial temperament;" challenges for cause and one peremptory challenge; staff judge advocate post-trial review; prohibition against returning for reconsideration an acquittal or reconsideration of a sentence imposed "with a view to increasing its severity;" established a board of review and prohibited execution of any sentence that included death, dismissal or dishonorable discharge until the board review concluded it was legally sufficient; and requirement for unanimous votes for death, 3/4 majority for sentence in excess of 10 years, and 2/3 for any other sentence.

83. *Id.* at 39-42 (e.g. creation of a civilian court of military appeals (UCMJ, art. 67); plenary power of court judge advocate over the conduct of the court-martial (UCMJ, articles 26 and 51b UCMJ); and one-third enlisted members at accused's request (UCMJ, art. 25).

84. Cox, *supra* note 57, at 11 (citing W. Generous, Swords and Scales 3-13 (1973) and Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 n.3 (1972).

85. Perhaps the classic case of maltreatment under the UCMJ involved Second Lieutenant Sidney Shapiro. He had been appointed to defend a soldier accused of assault with intent to rape. At trial he substituted another soldier at the defense table for the defendant. The alleged victim identified the interloper as the attacker, and the court convicted him of the charge. Shapiro then revealed his scheme to the court. The convening authority didn't take kindly to Shapiro's tactics and preferred charges against him for "delaying the orderly progress" of a courts-martial under the 96th Article of War. The charge was served at 1240 hours, trial commenced at 1400, and Shapiro was convicted and sentenced to be dismissed from the service by 1730 hours that same day. After being dismissed, he was promptly drafted back into the Army as a private. Shapiro's client did not fair much better, he was later retried and convicted of the original charge. *See* Generous, *supra* note 85, at 169-70; Luther West, *They Call it Justice* 39-40 (1977); DeVico, *supra* note 55, at 66.

86. DeVico, *supra* note 55, at 66.

87. UCMJ, art. 67.

88. UCMJ art. 31.

89. UCMJ art. 44.

90. UCMJ arts. 27 and 38.

91. UCMJ art. 39b.

92. Previously, the law officer was known as the court judge advocate who sat with the members and remained present during deliberations and voted like the other members. Often times he was not a judge advocate. *See United States v. Griffith*, 27 MJ 42, 45 (C.M.A. 1988).

93. *Id.*

94. Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess (1949). *Id.*

95. 1951 *Manual*, para. 75a.

96. *Id.*, at para. 75b(3).

97. *Id.*, at para 75c. *See Vowell*, *supra* note 60, at 35-36.

98. UCMJ art. 76a(4).

99. MCM, 1951, para. 76a(5).

100. MCM, 1951, paras. 76a(6) and (7).

101. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1355; UCMJ, articles 4e and 53d (1969). *See generally* Criminal Law Div. Note, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 25 (Military Justice Act of 1968 reflected wartime criticism that the system lacked individual procedural safeguards and that unlawful command influence had poisoned the fairness of courts-martial. Congress concluded that the military justice system needed a substantial overhaul to convince the public that the system actually protected the rights of accused service members).

102. Sam J. Ervin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77 (1969); *Griffith*, 27 M.J. at 45-46.

103. 1968 *Manual*, para. 75b. Service records was a technical term referring to only a portion of a soldier's personnel records. Under the change, any records properly maintained in accordance with departmental regulations that reflected past military efficiency, conduct, performance, and history of the defendant could be offered by counsel.

104. *See* Vowell, *supra* note 60, at 54.

105. Benchbook, *supra* note 20.

106. *See infra* notes 298-313 and accompanying text discussing jury instructions for sentencing.

107. 27 C.M.R. 176, 180 (C.M.A. 1959).

108. The Air Force Board of Review had reached a similar result several years earlier in *United States v. Dowling*, 18 C.M.R. 670 (A.F.B.R. 1954), when they upheld the law officer's decision denying the members request for information on sentences in comparable cases. The Air Force Board concluded that the provisions of paragraph 76a simply meant that members should consider cases they had previously adjudged. *See Vowell, supra* note 60, at 38 n. 180.

109. 24 C.M.R. 212 (C.M.A. 1957).

110. *Id.* at 215-216. In *Rinehart*, the trial counsel had encouraged the members to discharge appellant by referring them to paragraph 33h, of the 1951 *Manual*, which stated that retention of thieves "injuriously reflects upon the good name of the military service and its self-respecting personnel." The court concluded that permitting the members to use the manual would expose them to impermissible command influence. *Id.* at 215. *See also* *United States v. Boswell*, 23 C.M.R. 369 (C.M.A. 1957).

111. See *United States v. Blau*, 17 C.M.R. 232, 243 (C.M.A. 1954); Vowell, *supra* note 60, at 44-47.

112. See Vowell, *supra* note 60, at 58-61.

113. See *United States v. Billingsley*, 20 C.M.R. 917, 919 (A.F.B.R. 1955).

114. 4 M.J. 33 (C.M.A. 1977). The chief criticism of the post-trial interview was that the information it revealed about the defendant should have gone before the sentencing body rather than reserved for the exclusive consideration of the convening authority in his post-trial clemency review. *Id.* at 37 n. 18. See *infra* notes 282-292 and accompanying text discussing undue reliance on the convening authority and appellate courts to correct inappropriate sentences. The *Hill* Court also urged Congress to adopt some type of pre-sentence report that would be given to the sentencing body. This suggestion has never been adopted by Congress.

115. 46 C.M.R. 321 (C.M.A. 1973).

116. *Id.* at 322.

117. 1 M.J. 350 (C.M.A. 1976).

118. 9 M.J. 100 (C.M.A. 1980).

119. 10 M.J. 839 (N.M.C.R. 1981), *aff'd* 13 M.J. 403 (C.M.A. 1982).

120. Vowell, *supra* note 60, at 69, *citing* MCM, 1969, para. 75d, *as amended by* Executive Order 12315, 3 C.F.R. 163 (1982).

121. 9 M.J. 300 (C.M.A. 1980).

122. 11 M.J. 195, 201 (C.M.A. 1981).

123. *Id.* at 198 n. 5. The information suppressed was a letter of reprimand.

124. Prior to 1984, the amount and type of evidence about the defendant that could be offered during sentencing was controlled almost entirely by the accused and his counsel, and their decision whether or not to offer any evidence in extenuation and mitigation. *See supra* note 42 and accompanying text.

125. R.C.M. 1001(b)(5). In retrospect, this may have been a box better left unopened, considering the amount of appellate litigation rehabilitation potential has generated. This is due to the fact Congress and the President have failed to provide any concrete guidance on how rehabilitation potential should fit into the sentencing equation. *See infra* notes 269-72 and accompanying text discussing the current state of confusion regarding rehabilitation potential evidence.

126. *Id.*

127. R.C.M. 1001(d).

128. R.C.M. 1001(b)(4) discussion.

129. R.C.M. 1001(b)(5). But again, no specific guidance as to how a sentence should be affected by the fact the defendant pleaded guilty was provided.

130. *See* UCMJ, 1984, art. 60; R.C.M. 1106. *See generally* Vowell, *supra* note 60, at 85.

131. *See* Vowell, *supra* note 60, at 4.

132. Webster, *supra* note 2, at 222.

133. King Henry II passed a law in 1166 that decreed no man would be brought to trial unless found guilty by "twelve knights, good and true." *Id.*

134. "Four kinds of ordeal were in common use in England. The Ordeal by Fire required the accused to carry a piece of hot iron for nine paces. The hand was then wrapped for three days. At the end of the third day the bandage was removed; if the hand had festered, it was determined that the man was guilty because it had previously been requested that God keep an innocent man's hand clean of infection. The Ordeal



by Hot Water was similar to ordeal by fire in that the same routine was followed, except that the accused was required to remove a stone from the bottom of a vessel of boiling water. In the Ordeal of the Corsnade, the priest gave to the accused a one-ounce morsel of bread or cheese which had been charged to stick in the man's throat if he were guilty. When the Ordeal was by Cold Water the accused was bound and lowered into a pool of water which the priest had consecrated and adjured to received the innocent but to reject the guilty. Therefore, if the man floated he was guilty; if he sank he was innocent." See Windeyer, Legal History 14, 15 (2d rev. ed. 1957).

135. *Id.* at n.8. "In Compurgation or Wager at Law the accused swore that he was not guilty and he then called several of his neighbors to state upon their oath that the accused party's oath was clean, i.e. that he was the sort of person who would not tell a lie under oath. Although somewhat difficult to understand by modern standards, at this time in history a man would hesitate to swear a false oath. His neighbors, if not convinced of his innocence, might fear to support this oath because of their belief that the wrath of God would be made manifest upon them and that misfortunes would follow such a false oath. Therein lay the effectiveness of Compurgation." See Windeyer, *supra* note 134, at 12.

136. *Id.* at 223. Trial by Battle was also a way of determining the decision of God in the quarrels of men. Parties would either fight themselves, or hire a champion to fight for them. See Windeyer, *supra* note 134, at 44-46.

137. HANS & VIDMAR, JUDGING THE JURY 40 (1986).

138. U.S. CONST. art. III, § 2, cl. 3 (The trial of all crimes, except in cases of impeachment, shall be by jury....); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...."). With respect to state constitutions, *see supra* HANS & VIDMAR, note 137, at 31.

139. *See* Reese, *supra* note 10, at 327 *citing* *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (no sixth amendment right to jury sentencing, even where the sentence turns on specific findings of fact); *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972) (no federally guaranteed right to jury determination of sentence); *Payne v. Nash*, 327 F.2d 197, 200 (8th Cir. 1964) (nothing in fourteenth amendment gives right to have jury assess punishment).

140. John Poulos, *Liability Rules, Sentencing Factors and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 669 (1990). "The sixth amendment achieves this goal by interposing the common sense judgment of a group of laymen between the accused and his accuser, and by invoking the community participation and shared responsibility that results from that group's determination that the defendant is liable for punishment at the hands of the government."

141. U.S. CONST. amend. VIII.

142. See E.A.L. *supra* note 5, at 969, n. 2. The thirteen states that have at one time used or continue to use juries for sentencing are: Virginia, Alabama, Arkansas, Georgia, Indiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Tennessee, Texas, and Kentucky.

143. See Reese, *supra* note 10, at 328-29. The eight states still using juries in some form for sentencing are Mississippi, Arkansas, Missouri, Kentucky, Texas, Oklahoma, Tennessee, and Virginia.

144. See Adv. Comm. Rep. *supra* note 9, at 79. Some of the early reasons for jury sentencing were "colonial distrust of judges appointed by the crown (and later federalist-dominated courts), the frontier belief that the people should decide for themselves, and the general lack of difference in either training or competence between the judge and the jury throughout much of the nineteenth century." *Id.*

145. MISS. CODE ANN. § 97-3-67; 97-3-71 (Lawyers Co-op. Supp. 1988).

146. KY. R. CRIM. PROC. 9.84(1) (1992).

147. ARK. STAT. ANN. § 5-4-103 (1992).

148. MO. ANN. STAT. § 557.036 R.S. Mo. (1991).

149. OKLA. STAT. ANN. tit. 22, § 926, 927 (1991).

150. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon Supp. 1990).

151. TENN. CODE ANN. § 40-20-106 (Michie 1982).

152. VA. CODE ANN. § 19.2-295 (1992).

153. *See Roman v. Parrish*, 328 F. Supp. 882 (E.D. Va. 1971).

154. *Vines v. Murray*, 553 F.2d 342 (4th Cir.), *cert denied* 434 U.S. 851 (1977). One could compare this suspension power to the convening authority's clemency power.

However, the trial judge is an observer at the trial as opposed to the convening authority who is reviewing the case on paper.

155. *See generally* E.A.L. *supra* note 5.

156. *Id.*, *see also*, *Few are Willing to Gamble on Jury*, The Daily Progress (Charlottesville, Va), 17 Nov. 1992, at 1. This article noted that within the Charlottesville, Virginia area, the vast majority of the people charged with crimes are not willing to gamble on a jury, despite the fact juries present a better chance for acquittal. Jury sentences in drug cases were five times more severe than those from judges. Sentences for burglaries and violent felonies were over twice as severe as those

from judges. As a result of these manifest differences, 802 of the 831 defendants who pleaded guilty between 1989 and 1991, had their sentence decided by the trial judge, and 155 of the 162 contested trials were tried before a judge without a jury.

157. U.S. CONST. Amend. VIII; UCMJ art. 55.

158. R.C.M. 1006(e)(3) "Instructions on sentence shall include ... a statement informing the members that they are solely responsible for selecting an appropriate sentence...."

159. *See* Vowell, *supra* note 60, at 6.

160. *Id.* at 7, n. 20 (citing Minority Report of Mr. Sterritt before the 1983 Advisory Commission).

161. *See* Benchbook, *supra* note 20, para. 2-39 ("you should select a sentence which best serves the ends of good order and discipline in the military, the needs of the accused, and the welfare of society").

162. The opinion of the general public is critical to any assessment of our military justice system. *See* Cox, *supra* note 57, at 2 ("Our system of military justice cannot be viewed solely from the vantage point of the military; it must also be viewed from the perspective of the people and the politicians").

163. Responses were received from 54 defense counsel, 68 prisoners, 25 SOLO course attendees, 47 convening authorities, 15 military judges, and 68 staff judge advocates. [Hereinafter Thesis Survey]. This survey does not profess to be a model of scientific accuracy. Nevertheless, it does represent the insights of a large portion of those persons involved in the administration of military law.

164. The Advisory Commission survey conducted a far more comprehensive survey of convening authorities, appellate court judges, staff judge advocates, and trial and defense counsel, in conjunction with their overall study of military justice. [Hereinafter Adv. Comm. Survey].

165. In 1983, 60% of the defense counsel surveyed stated that sentencing considerations are more important than findings in forum selection. *Id.* at 25. Specific responses from defense counsel surveyed in 1993, regarding the advice they give clients on forum selection included: "its better to go with a new panel as opposed to a 'hardened' one; "if you have a sympathetic victim or any other particularly aggravating factor, stay away from members"; "the military judge is less swayed by emotion and argument of counsel"; "if the accused has a good case in extenuation and mitigation go with members"; if you have a pretrial agreement (safety net) you may as well take a risk of beating the deal with a panel, because the judge is more likely to adjudge a sentence within a narrower range than will a panel"; "a panel for sentencing without a pretrial agreement is a 'crapshoot'"; if its a military offense -- avoid members"; the accused may want to waive members in order to get a better pretrial agreement. Thesis Survey *supra* note 163. See

also John E. Baker and William L. Wallis, *Predicting Courts-Martial Results: Choosing the Right Forum*, ARMY LAW. 71, (Sep. 1985)

166. Adv. Comm. Rep. *supra* note 9, at 27. During hearings, the American Civil Liberties Union offered the following comment: "The public's perception that the military justice system is fair and their continued confidence in the system are necessary in order to achieve general public support for the armed forces. Public perception regarding the fairness of the system is enhanced when service members have options such as that of selecting their sentencing authority." See also Adv. Comm. Survey, *supra* note 10, at 21. Trial and defense counsel agree that elimination of the option would appear to deprive an accused of a substantial right. Although most parties agreed that giving an accused the option to select the sentencing forum is good, none of the parties surveyed in 1983 approved of giving the accused even greater choices. *Id.*

167. R.C.M. 705(c)(2)(E). Thirty-four of fifty-four defense counsel stated that they offered to waive members for findings or sentence in hopes of a better pretrial agreement for their client. Six of eighteen prisoners who pleaded guilty specifically waived members for sentencing to get a better deal. Thesis Survey *supra* note 163..

168. R.C.M. 705(c)(2)(E). See *United States v. Stewart*, 2 M.J. 423, 426 (C.M.A. 1975).

169. See *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (appellant nonetheless felt so constrained to avoid court-martial with members that he requested trial by the very

same judge alone" who had denied appellant's challenge for cause that the judge could not be impartial because the judge's daughter was a good friend of the victim of the alleged indecent acts. The Court noted that appellant's instincts were on the mark as the members eventually sentenced appellant to the literal maximum punishment allowed by law). *Id.*

Twelve of seventeen prisoners who pleaded not guilty before a military judge did so to avoid member sentencing. Only four of the seventeen regretted this decision, compared to fourteen of the twenty-nine who regretted their decision to be tried and sentenced by members. Thesis Survey *supra* note 163.

170. Thirteen of fifty-four defense counsels surveyed volunteered that they often give this type of advice to their clients. Thesis Survey *supra* note 163.

171. Statistics on general court-martials tried before military judge alone over the past five years.

FY	Cases	Judge Alone	Percentage
1988	1629	1103	67%
1989	1585	1011	63.8%
1990	1451	995	68.6%
1991	1173	782	67.5%
1992	1168	782	66.6%



Information furnished by the Office of the Clerk of Court, U.S. Army Judiciary, 5611 Columbia Pike, Falls Church, VA 22041-5013.

172. One could argue that the percentage of judge alone cases would be even higher, since many of the soldiers requesting trial by members are doing so because they want to be tried on the merits by members, not necessarily because they prefer to be sentenced by them. This is supported by statistics on guilty pleas over the last five years which indicate a steady 80% preference for judge alone sentencing. Albeit, these numbers may be influenced by the fact that some jurisdictions require a waiver of members in order make a pretrial agreement with the convening authority. *See supra* text accompanying notes 168-172 discussing waiver of sentencing by members during pretrial negotiations.

#### GUILTY PLEAS

FY	Judge Alone	Members
1988	1455 - 82%	323 - 18%
1989	1239 - 77%	366 - 23%
1990	1148 - 80%	283 - 80%
1991	887 - 82%	194 - 18%
1992	1035 - 82%	208 - 20%

Information furnished by the Office of the Clerk of Court, U.S. Army Judiciary, 5611 Columbia Pike, Falls Church, VA 22041-5013.

173. Adv. Comm. Rep. *supra* note 9, at 28. "Military judge alone sentencing will relieve commanders of the need to expend valuable line officer assets for this purpose, which is particularly critical in wartime".

174. See Ervin, *supra* note 102, at 92-93. "The armed services, which vigorously supported this provision [option to be tried by military judge alone], anticipate that this new procedure will result in a great reduction in both the time and manpower normally expended in trials by court-martial." See also United States v. Butler, 14 M.J. 72, 73 (C.M.A. 1982) (cost efficiencies should encourage bench trials where appropriate and properly requested by an accused).

175. Adv. Comm. Rep. *supra* note 9, at 28. "Continuing a service member's forum option through the sentencing phase enables an accused to 'forum shop' for the court-martial composition which is likely to award the most lenient sentence."

176. *Id.* at 48, citing testimony of Chief Judge Cedarburg, United States Coast Guard.

177. Adv. Comm. Survey, *supra* note 10, at 20. When asked how often court-member sentences and military judge sentences were inappropriately harsh or lenient, convening authorities generally rated members and judges about equal, although Air Force convening authorities felt that members gave inappropriate sentences slightly more often than did judges. All lawyer groups, particularly judges, felt that members gave

inappropriate sentences more often than judges, with defense counsel coming closest to calling them equal in this area.

178. Thesis Survey *supra* note 163.

179. See Grove, *supra* note 3, at 29. This is especially true when an unusually disproportionate sentence gets widespread attention. Civilians tend to be more offended by excessive sentences like that handed down to Air Force Second Lieutenant Joann Newak, whose sentence for drug offense and homosexual sodomy included seven years confinement. *Id.*, citing McCarthy, *Justice for a Lieutenant*, Wash. Post. Jan. 9, 1983, at M.4; *United States v. Newak*, 15 M.J. 541 (A.F.C.M.R.), rev'd 24 M.J. 238 (C.M.A. 1987).

180. R.C.M. 1107(d)(1) "The convening or higher authority may not increase the punishment imposed by a court-martial."

181. See R.C.M. 1107(d)(1) and UCMJ, 1984, art. 66.

182. All groups overwhelmingly agreed that judges sentences more consistently in similar cases. Adv. Comm. Survey, *supra* note 10, at 22.

183. Opinions on this matter differed greatly among all parties surveyed. See generally Thesis Survey *supra* note 163 and Adv. Comm. Survey, *supra* note 10.

184. Thesis survey responses from defense counsel confirmed this belief that their clients stood a better chance of getting a more lenient sentence with court-members. Thesis Survey *supra* note 163.

185. From FY88-FY92, the United States Army Court of Military Review (ACMR) the sentences in 2.6% of all cases with involving members for sentencing had to be reassessed because of sentencing errors, compared to 1.5% of cases with military judges determining the sentence in which there was an error only on sentencing. Statistics provided by the Clerk of Court, United States Army Court of Military Review, 5611 Columbia Pike, Falls Church, VA 22041-5013.

186. Adv. Comm. Rep. *supra* note 9, at 47 (testimony of Brigadier General Moore, United States Marine Corps (Retired)).

187. *E.g.* United States v. Oquendo, 35 M.J. 24 (C.M.A. 1992) (improper testimony on rehabilitation potential from defendant's battalion commander and command sergeant major not harmless because their views would logically be afforded serious consideration by the court-martial members); United States v. Stinson, 34 M.J. 233 (C.M.A. 1992); United States v. Rice, 33 M.J. 451 (C.M.A. 1991); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989).

188. *See infra* notes 282-92 and accompanying text discussing undue reliance upon the convening authority and courts of review to correct inappropriate sentences.

189. See UCMJ, 1984, arts. 25, 37, and 98.

190. UCMJ art. 25(c).

191. UCMJ art. 25(d).

192. The term "blue ribbon panel" was first mentioned during the Senate Hearings on the 1951 Manual for Courts-Martial. See Adv. Comm. Rep. *supra* note 9, at 67 (citing Hearings on S.H. on 5957, Before a Subcommittee of the House Committee on Armed Services, 81st Cong. 1st Sess. 94 (1949)).

193. "Several questions tested perceptions of the 'quality' of court members, the importance of court member duty, and the value of court duty to the court members. All groups believed that the 'best qualified' personnel were sometimes or usually selected for duty, although the lawyers who actually see them in court (military judges, trial counsel, and defense counsel) had a slightly lower opinion of members' qualifications. Convening authorities and staff judge advocates generally thought that members were 'seldom' or 'sometimes' selected based primarily upon their relative expendability. The other groups thought that expendability played a slightly greater role in member selection." Adv. Comm. Survey, *supra* note 10, at 21.

194. UCMJ, 1984, art. 25(e). In *United States v. Carter*, 25 M.J. 471, 478 (C.M.A.

1988), Judge Cox noted that this power over the selection process gives the Government the "functional equivalent of an unlimited number of peremptory challenges." *Id.*

195. *Id.* See also R.C.M. 505(c)(1).

196. Of the forty-seven convening authorities surveyed, twelve spent less than one hour, ten spent about one hour, eleven spent one to two hours, seven spent longer than two hours, and seven spent longer than one day. One convening authority commented "I don't have time to choose, so I rely on the people I know that are on the list." Another felt that the two hours he spent was "an inordinate amount of time to be spent on court-member selection." Thesis Survey *supra* note 163. In a 1977 study, the Comptroller General interviewed thirteen convening authorities from the four services. The study found that all convening authorities used different criteria, such as position, type of experience, grade, and availability to exclude persons from consideration. Some personally select jurors while others selected from nominations by subordinates. Some had not discussed selection criteria with subordinates who nominate jurors. The Comptroller General ultimately recommended that UCMJ art. 25 be amended to require random selection of court members. This recommendation was not adopted. See *Military Jury System Needs Safeguards Found in Civilian Federal Courts*, Comp. Gen. Rep. B-186183 at 16-18 (Jun. 6, 1977).

197. 32 M.J. 439 (C.M.A. 1991). See also *United States v. McCall*, 26 M.J. 804

(A.C.M.R. 1988) (the Army held "it sounds like somebody has already selected a list of people to take in to the convening authority for him just to kind of rubberstamp").

198. UCMJ, 1984, art. 37 provides: "No authority convening a ... court-martial nor any other commanding officer may censure, reprimand, or admonish the court or any member, military judge or counsel thereof ... No person subject to this chapter may attempt to coerce or by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof ..."

199. UCMJ 1984, art. 98 provides: "Any person subject to this chapter who ... knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct."

200. *E.g.* United States v. Redman, 33 M.J. 679 (A.C.M.R. 1991) (convening authority selects new panel because dissatisfied with court-martial results of current panel); United States v. Jameson, 33 M.J. 669 (N.M.C.M.R. 1991) and United States v. Jones, 33 M.J. 1040 (N.M.C.M.R. 1991). In both *Jameson* and *Jones*, witnesses who provided favorable testimony for homosexual defendants were relieved from leadership positions.

201. The majority of appellate cases addressing unlawful command influence involve command influence related to sentencing as opposed to the merits. *E.g.* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986); and United States v. Treacle, 18 M.J. 646

(A.C.M.R. 1984) which involved commanders discouraging soldiers from testifying for defendants during sentencing. *See also Jameson and Jones supra*. In guilty pleas, command influence is always directed at sentencing.

202. *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991) (exposure to pleas and motions did not require recusal of the military judge; *United States v. Stinson*, 34 M.J. 233 (C.M.A. 1992) (in absence of evidence to the contrary, we assume the military judge properly evaluated the evidence in accordance with Mil. R. Evid. 403 and 702); *United States v. Oulette*, 34 M.J. 798 (N.M.C.M.R. 1991) (Military judge's assertion of impartiality afforded great weight).

203. Although R.C.M. 1001(b)(4) permits the government to present evidence in aggravation directly related to the offense, the government is extremely limited in its ability to offer evidence about the accused. *See Magers, supra* note 8, at 59.

204. 11 M.J. 195, 198 (C.M.A. 1981).

205. *Id.* at 201.

In a similar vein, it must be remembered the sentencing body in the military justice system ... may be the lay members of a court-martial rather than a military judge. In such a system of criminal justice, the military judge must act in a manner to ensure the integrity of the court members as impartial and



properly informed decision makers. Such a reality in the military justice system substantially effects the exercise of discretion by the military judge in the array of information he may permit to go before the members on the question of sentencing and in his decision to *sua sponte* instruct them concerning the permissible use of such evidence. In this light, he should be particularly sensitive to probative dangers which might arise from the admission of uncharged misconduct evidence during the sentence procedure which, though relevant or even admissible, would unduly arouse the members' hostility or prejudice against an accused. (cites omitted).

206. Mil. R. Evid. 403. *See* United States v. Zengel, 32 M.J. 642 (C.G.C.M.R. 1991).

207. United States v. Bennett, 28 M.J. 985, 987 (A.F.C.M.R. 1989) (Kastl, J. concurring).

208. Adv. Comm. Rep. *supra* note 9, at 39 (Testimony of Colonel Garner, United States Army).

209. *See* Grove *supra* note 3, at 27.

210. Charles W. Schieser and Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: the Removal of Commanders from Military Justice*; 7 TEX. TECH L. REV. 565 (1976):

Unlawful command influence exists in significant part because the present structure of American military justice permits it to exist. That structure sets up conditions which virtually insure that unlawful command influence will be present in a variety of ways ... To attack this problem inherent in the present system of military justice is not to impugn the integrity of military commanders. Military commanders are no better and no worse, insofar as the present analysis is concerned, than any other citizens of our society; neither are they inferior, morally or ethically, to legal personnel.

211. *Id.* at 566.

212. Twenty-two of forty-seven convening authorities listed this as a reason to preserve member sentencing . Twenty-five of sixty-eight staff judge advocates expressed the same opinion. Thesis Survey *supra* note 163. Convening authorities and defense counsel surveyed in 1983 felt member sentences more fairly reflected the sense of justice in the community. Adv. Comm. Survey *supra* note 10, at 19-20.

213. Thesis Survey *supra* note 163.

214. Thesis Survey *supra* note 163. All groups surveyed in 1983, except appellate judges and Marine Corps staff judge advocates, agreed that judges are influenced not to exceed the sentences adjudged by members in similar cases so as not to discourage requests for judge alone trials. Adv. Comm. Survey *supra* at 21. Major General Oaks, United States Air Force, testifying before the commission noted, "[The sentencing authority] option in fact makes the judge's decision ... more fair, because he knows he's being played off. If I know that I'm always going to sentence ... there is a possibility that I would be less attentive to my responsibilities. ... It's competition.... I just know ... [it's] good for [judges] to realize [they don't] have absolute power all the time." Adv. Comm. Rep. *supra* note 10, at 49.

215. Thesis Survey *supra* note 163 (responses from SOLO course attendees). Whatever advantage group decision making may offer is offset by the corresponding risk that members may attempt to compromise their verdict or sentence and "split the baby." See *supra* notes 279-81 and accompanying text discussing compromise verdicts. Moreover, the argument that a group can make a better decision begs the question since all of the group members are untrained in the laws and principles of sentencing. The fact they are a group cannot overcome their lack of training to perform this very complicated task.

216. See *Solorio v. United States*, 483 U.S. 435 (1981) (jurisdiction of courts-martial depends solely on accused's status as a member of the Armed Forces).

217. See William C. Westmoreland and George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 41, n. 128 (1980). See also *Reid v. Covert*, 354 U.S. 1, 23-30 (1957) discussing jurisdiction of courts-martials. .

218. See *supra* notes 171 and 172, for courts-martial statistics on the number of trials by judge alone versus court-members.

219. See Thesis Survey *supra* note 163; Adv. Comm. Survey, *supra* note 10, at 22.

220. In somewhat of a surprising response, all groups, including convening authorities, when asked whether depriving members of sentencing authority would deprive the command of important powers, said that it would not. *Id.* at 22.

221. Six of forty-seven convening authorities agreed that court-marital duty better prepares junior officers for leadership. Thesis Survey *supra* note 163.

222. Adv. Comm. Rep. *supra* note 9, at 37.

223. *Id.* at 37.

224. *See* United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (we doubt that a court-martial whose membership is skewed in this manner [only E-8s and E-9s] was what Congress had in mind); United States v. Greene, 43 C.M.R. 72,78 (C.M.A. 1970) (panel consisting of three colonels, and six lieutenant colonels gave appearance of being "handpicked" by government); United States v. James, 24 M.J. 894, 896 (A.C.M.R. 1987) (lack of lieutenant or warrant officers on panels for past year does not prove systematic exclusion).

225. *See supra* text accompanying note 208 (court members "represent the decision making level of the Army").

226. *See supra* note 58 discussing origins of military justice.

227. "Although a military judge might bring a fresh perspective to the sentencing procedure, there is 'that responsibility that the commander has that the judge can never assume;' 'that responsibility is unique for the military ... [T]hat's why the involvement must be there.'" Testimony of General Robert W. Sennewald, United States Army before the 1983 Advisory Committee. Adv. Comm. Rep. *supra* note 9, at 32.

228. *Id.* at 32.

229. Ervin, *supra* note 102, at 92. The support was primarily because of the savings in both the time and manpower involved in trials by court-martial. *Id.*

230. Adv. Comm. Survey *supra* note 10, at 31. But most convening authorities and Army staff judge advocates believed that such a procedure would create the appearance that command authority had been diminished - presumably among soldiers.

231. Adv. Comm. Rep. *supra* note 9, at 47-48.

232. The proposal to eliminate members from straight special court-martials was raised after Operation Desert Storm. During the operation, it was reported by some judge advocates that defense counsel were using the right to demand trial by members to get their clients more favorable pretrial agreements. The administrative difficulties related to securing the presence of members for a special courts-martial during combat prompted some commands to agree to more favorable sentence limitations in return for an accused waiving the right to be tried or sentenced by members than the commands might have been under different circumstances. Telephone Interview with Major Eugene Milhizer, Criminal Law Division, Office of the Judge Advocate General, (Mar. 26 1993). For an explanation of the Joint Service Committee on Military Justice, *see* Criminal Law Div., *Amending the Manual for Courts-Martial*, ARMY LAW. April 1992 at 78, 79-80.

233. *See* Adv. Comm. Rep. *supra* note 9, at 67-68.

234. The military judge is also involved in this decision to the extent he does not abuse his discretion to grant or deny the accused's request. R.C.M. 903(d)(2).

235. Adv. Comm. Survey, *supra* note 10, at 95.

236. See Adv. Comm. Rep. *supra* note 9, at 112. Minority report of Mr. Sterritt. "There was little, if any, support for a return to mandatory member sentencing from the senior military commanders who testified before the commission." *Id.* Nor does there appear to any current interest in returning to the practice of mandatory member sentencing. Only one SOLO course attendee suggested this in his comments. Thesis Survey *supra* note 163..

237. Thesis Survey *supra* note 163.. One convening authority responded that "we are dealing with a system in which an inherent part of the soldiers perception of fairness and justice is that his fellow soldiers will judge and sentence him from both a legal and soldierly point of view. To retain soldier's respect and confidence, this is one of those acceptable and necessary 'differences' [from the civilian procedure]." Numerous other convening authorities commented that members "represent the institution whose laws have been violated," and have a "direct stake in the sentence adjudged." *Id.*

238. Adv. Comm. Rep. *supra* note 9, at 33.

239. See Westmoreland, *supra* note 16, at 20. "A system of justice must therefore be

fully integrated into the Armed Services so that it can operate equally well in war as well as in peace. We need a system that is part of the Army to permit the administration of justice within a combat zone, and to permit our constitution and American legal principles to follow our servicemen wherever they are deployed."

240. *See supra* text accompanying note 232 discussing defense counsel tactics in Operation Desert Storm.

241. *See* United States v. Kemp, 46 C.M.R. 152 (C.M.R. 1973) *relying on* Ex Parte Quirin, 317 U.S. 1 (1942).

242. Perhaps with the exception of straight special courts-martials, where the maximum punishment is only six months confinement. *See* R.C.M. 201(g)(2). This is currently the proposal being evaluated by the Working Group of the Joint Service Committee. *See supra* note 232.

243. *See supra* text accompanying note 139 discussing the absence of a constitutional right to be sentenced by a jury.

244. Adv. Comm. Rep. *supra* note 9, at 205 (Separate Statement of Professor Kenneth F. Ripple).

245. *See* Benchbook, *supra* note 20, para. 2-59.



246. *See* Adv. Comm. Survey, *supra* note 10, at 21. Survey demonstrated a definite split between convening authorities and attorneys regarding who has a better understanding of sentencing ramifications.

247. *Id.* at 90 (Minority opinion of Mr. Sterritt, citing ABA Standards Relating to Sentencing Alternative and Procedures § 1.1b (Sep 1968)).

248. UCMJ 1984, art. 26.

249. *See* Adv. Comm. Rep. *supra* note 9, at 76 citing the ABA Standards Relating to Sentencing Alternatives and Procedures, § 1.1(c) September 1968. Nor can juries possibly be expected to develop this expertise for the one or more court-martials they might sit on Adv. Comm. Rep. at 75. *See also* Rinehart, 24 C.M.R. 212, (C.M.A. 1957) (judges instructions cannot be expected to make up for the years of training and experience that a military judge brings to each court-martial).

250. A select few brigade and battalion commanders have the opportunity to attend the SOLO course at the Judge Advocate General's School. This class is designed to orient brigade and battalion level commanders on the legal issues they are likely to confront as commanders. One of the electives offered includes an hour of instruction on sentencing principles and procedures. It touches on punishments, confinement, parole, clemency, and good time. Ironically, its this type of information that members are specifically

instructed not to consider. *See infra* notes 273-78 and accompanying text. Most likely the intent of the SOLO course is to train commanders in legal issues related to their duties as convening authorities and commanders as opposed to preparation for duty as potential court-members.

251. *See* R.C.M. 912; *United States v. Swagger*, 16 M.J. 759 (A.C.M.R. 1983) (individuals assigned to military police duties should not be court-members).

252. Benchbook, *supra* note 20, para. 2-39.

253. *See* Vowell, *supra* note 60, at 67 (discussing Former Chief Judge Fletcher's opinion that one of the deficiencies of military sentencing was the lack of evidence before the sentencing body, and how his view was influenced by the fact members often sentence the accused and are unable to properly apply evidence that a military judge would otherwise be presumed to understand and properly apply).

254. 4 M.J. 33 (C.M.A. 1977).

255. 11 M.J. 195 (C.M.A. 1981)

256. The letter of reprimand was ruled inadmissible because it was issued by the commander for the specific purpose of aggravating the court-martial sentence, not as a management tool. *Id.* at 199.

257. 42 C.M.R. 227 (C.M.A. 1970).

258. UCMJ, 1969, para. 75d.

259. *Id.* at 231. *See also* United States v. Philipppson, 30 M.J. 1019 (A.F.C.M.R. 1990); United States v. Williams, 34 M.J. 1127 (A.F.C.M.R. 1992) *aff'd upon reconsideration* 35 M.J. 812 (A.F.C.M.R. 1992) ("future dangerousness" of defendant inadmissible, but military judge presumed to limit consideration to proper factors only).

260. R.C.M. 801(a)(1)-(5).

261. *Id.*

262. Mil. R. Evid. 104(a): "Preliminary questions concerning ... the admissability of evidence ... shall be determined by the military judge."

263. Mil. R. Evid. 103(a): "In a court-martial composed of a military judge and members, proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members." *See also* Mil. R. Evid. 104(e): "Hearings on the admissability of statements of an accused

under Mil. R. Evid. 301-306 shall be in all cases conducted out of the hearing of the members."

264. Mil. R. Evid. 104(a).

265. 23 C.M.R. 369 (C.M.A. 1957).

266. 24 C.M.R. 212 (C.M.A. 1957).

267. The paragraphs cited by the trial counsel were paragraphs 33h and 75a(5) of the 1951 *Manual*. The passages discovered by the members were paragraphs 76a(3) (previous convictions) and 76a(4) (factors which may be considered are penalties adjudged in other cases for similar offenses). The members asked the law officer for information on sentences in other similar cases and for an explanation of what paragraph 76a(3) meant. The law officer instructed the members to decide this case on its facts alone and to disregard paragraph 76a(3). *Id.*

268. *Id.* at 406-07.

269. *See e.g.* United States v. Horner, 22 M.J. 294 (C.M.A. 1986), United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989), United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Claxton, 32 M.J. 159 (C.M.A. 1991); and United States v. Goodman, 33 M.J. 84 (C.M.A. 1991). For cases involving evidence in aggravation *see* United States v.

Wingart, 27 M.J. 128 (C.M.A. 1988) (uncharged misconduct is irrelevant unless it relates directly to the accused's offense); *United States v. Hall*, 29 M.J. 786 (A.C.M.R. 1989) (evidence of absence and escape from custody to avoid court-martial are only relevant to defendant's rehabilitation potential; uncharged distribution of crack cocaine was not directly related to charged offense and therefore inadmissible); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (government cannot offer evidence that defendant appeared before the Disciplinary Barracks disciplinary board on nineteen occasions while confined because it is not directly related to charged offense).

270. Mil. R. Evid. 403.

271. *See generally* *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227, 230 n.5 (C.M.A. 85).

272. *See* *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989) (military judge must make ruling if defense counsel objects to uncharged misconduct in the stipulation of fact); *but see* *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990) (although evidence inadmissible, defendant agreed to permit use in return for a favorable sentence limitation, and no evidence of government overreaching).

273. 25 M.J. 423 (C.M.A. 1988), *cert denied*, 487 U.S. 1206 (1988).

274. The *Griffin* court nevertheless affirmed the trial court's ruling because the defense

counsel consented to the proposed instruction concerning the effect a punitive discharge would have on the accused's retirement benefits. Moreover, the Court noted that often times, what might be labeled as a "collateral" consequence of a sentence, is in fact the "single most important" matter to the accused and the sentencing authority.

Consequently, such a factor should hardly be considered collateral, but rather directly related to the offense and the accused and therefore should be instructed on by the military judge. In his concurring opinion, Chief Judge Everett was of the opinion it is appropriate for members or the judge to consider the collateral consequences of various sentencing alternatives.

*Id.* at 425 (Everett, J. concurring).

275. *See United States v. Rosato*, 32 M.J. 93 (C.M.A. 1991) (military judge erred by denying defendant the important right to testify about the Air Force Correction and Rehabilitation Squadron).

276. Vowell, *supra* note 60, at 97.

277. *United States v. Hannan*, 17 M.J. 115 (C.M.A. 1984). In *Hannan* the defendant entered a pretrial agreement with the convening authority that called for maximum confinement of one year. The judge sentenced him to one year and a day so that he would be eligible for parole within six months. Soldiers sentenced to a year or less were not eligible for parole and consequently would have to serve the full term less any good

time. Despite the military judge's intent, appellant's complaint that he should get the benefit of parole was denied by the Court.

278. R.C.M. 1107(b)(3)(B)(iii): "Before taking action the convening authority may consider 'such other matters as the convening authority deems appropriate.'" *See also Hannan*, 17 M.J. at 124. "[T]he staff judge advocate should have discussed in his review how parole eligibility would be affected if confinement were reduced pursuant to the pretrial agreement."

279. *See Adv. Comm. Rep. supra* note 9, at 29, 45; *E.A.L. supra* note 5, at 995 discussing jury nullification in drunk driving cases.

280. *See E.A.L. supra* note 5, at 986-97. "It has often been stated that in determining the defendant's guilt the jury should focus only on the evidence before it and should not be swayed by the nature of the punishment which would follow a verdict of guilty. However, when the jury is to determine the sentence in addition to the issue of guilt or innocence, this principle is taxed to the breaking point."

281. *See Adv. Comm. Rep. supra* note 9, at 45. Contrary to the general conclusion reached by the Advisory Commission that compromise verdicts occur "infrequently", were the 1983 survey results in which all lawyer groups indicated that compromises "sometimes" occur. *Adv. Comm. Survey, supra* note 10, at 23.

282. R.C.M. 1107(d). This power even extends to those offenses that carry a mandatory punishment. R.C.M. 1107(d)(2).

283. UCMJ 1984, art. 66:

In a case referred to it, the Court of Military Review may ... affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the evidence.

284. Rollman, *supra* note 54, at 215.

285. R.C.M. 1107(b)(3)((B)(iii). Before he may consider such matters, the convening authority must give the defendant notice and an opportunity to respond. *Id.*

286. Two staff judge advocates surveyed listed post trial review by the convening authority and appellate courts as a safeguard against errant member sentences. Thesis Survey *supra* note 163..

287. 13 MJ 278 (C.M.A. 1982).



288. *Id.* at 284.

289. Byers, *supra* note 8, at 100.

290. *See* Brown, *supra* note 8, at 12.

291. In FY 1990 the total time for appellate review, from the date of trial, to date of written opinion from the Army Court of Military Review, averaged 217 days. In FY 1991 the average post-trial processing time was 182 days. In FY92 the average was 201 days. The average processing time from end of trial to action by the convening authority was 52 days in FY90, 66 in FY91, and 74 in FY92. Information provided by the Clerk of Court, The United States Army Court of Military Review, 5611 Columbia Pike, Falls Church, VA, 22041-5013.

292. *See supra* text accompanying note 180 discussing effects of unduly lenient sentence on unit morale and discipline.

293. Fifteen of sixty-eight staff judge advocates commented that members are more likely to be swayed by emotion and argument of counsel in their sentencing deliberations. Thesis Survey *supra* note 163..

294. Thesis Survey *supra* note 163.

295. *Id.*

296. All groups, except appellate judges and Marine Corps staff judge advocates, agreed that judges may moderate their sentences to encourage soldiers to continue requests for judge alone trials. Adv. Comm. Survey, *supra* note 10, at 21. Four of forty-seven staff judges advocates surveyed felt this was true. However, thirteen of fifteen trial judges, the parties most effected by this observation, strongly disagreed that this occurred. Thesis Survey *supra* note 163.

297. *See supra* notes 171 and 172 for court-martial statistics.

298. *See United States v. Sauer*, 15 M.J. 113, at 116, 117 (C.M.A. 1983) (salutary principle that a sentencing authority should be provided with as much information as possible).

299. In view of the complicated nature of sentencing, as compared to the determination of a fact, significant time and effort must be expended by the judge in fashioning his instructions, communicating his instructions and ensuring the members proper understanding. Even then, there is no assurance that an inexperienced members (sic) can follow these instructions without error. The possibility of error and reversal on

appeal generates additional consumption of judicial and military resources.

Adv. Comm. Rep. *supra* note 9, at 91 (Minority report of Mr. Sterritt). See Benchbook, *supra* note 20, para. 1-2: "No standardized set of instructions can cover every situation arising in a trial by courts-martial. Special circumstances will invariably be presented requiring instructions not dealt with in this benchbook."

300. R.C.M. 1005(e).

301. Benchbook, *supra* note 20, para 2-37. See *supra* notes 43-48 and accompanying text discussing jury instructions. But the guidance contained in the Benchbook is deficient for two reasons; (1) there is insufficient detail to help judges craft meaningful instructions; (2) it is subject to being overruled since it is only a DA pamphlet. See Vowell, *supra* note 60, at 95.

302. RCM 1005(e)(4) discussion; Benchbook, *supra* note 20, para. 2-37.

303. See *Griffin*, 25 M.J. 423).

304. See *Warren*, 13 M.J. 278. After discussing the complexity of first, determining whether an accused lied in court, and second, how that should be factored in to the sentence, Judge Kastl commented that "it is one thing to permit a trained judge to

consider an accused's false testimony in reaching a sentence ... But it is quite a different matter to permit a court-martial consisting of members to do this." In its opinion affirming the Air Force court's decision to permit members to perform this difficult task, the Court of Military Appeals joined in Judge Kastl's concern that "the particular pet we welcome today into our judicial household will not easily be housebroken." *Id.* at 284. See *United States v. Below*, ACM S26133 (A.F.C.M.R. 28 Oct. 1983) (sentence set aside where military judge instructed panel to consider accused's awards and decorations but failed to mention combat service); *United States v. Kirkpatrick*, 33 M.J. 132 (C.M.A. 1991) (plain error to instruct members to consider Army policy on drugs). Compare *United States v. Chavez*, 28 M.J. 691 (A.F.C.M.R. 1991) (military judge erred by instructing on defendant's failure to express remorse, but it was not error to instruct on defendant's lack of remorse) with *United States v. Holt*, 33 M.J. 400 (C.M.A. 1991) (consideration of accused's recalcitrance in admitting guilt is appropriate in the proper case).

305. 13 MJ 278, *supra*.

306. *Id.* at 286.

307. 31 M.J. 95 (C.M.A. 1990).

308. *Id.* "In other words, if an offense does not ordinarily warrant a punitive discharge, then it would be inappropriate to award such a discharge to an accused because he

lacked "rehabilitation potential." *But see* (Sullivan, C.J. concurring in part, dissenting in part) (military tradition that commander's opinion whether defendant could be restored to his former place in unit was common measure of rehabilitation potential in the military). *Id.* at 100. It appears Chief Judge Sullivan's view has prevailed. In *United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991) the Court found harmless error in asking "Do you want ... [the defendant] back in your unit?" and "Do you think he has a place in the Army?" because it is self-evident that most people have qualms about having someone in the unit or the service who has "torched" the barracks.

309. *See United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991).

310. 13 M.J. at 285, n. 5.

311. *See Mil. R. Evid.* 105.

312. *See Montgomery*, 42 C.M.R. at 231 (Military Judge presumed to know and consider only relevant evidence). *Compare United States v. Donnelly*, 13 M.J. 79 (C.M.A. 1982) (hearing on sentence was before military judge; under such circumstances we conclude no prejudicial error) *with United States v. Boles*, 11 M.J. 195, 199 (C.M.A. 1981) (in view of the above and the severe sentence adjudged in this court-martial, our misgivings as to its impact on the members are justified); *compare also United States v. Williams*, 35 M.J. 812 (A.F.C.M.R. 1992) (expert testimony of defendant's "future dangerousness", harmless because military judge gave it diminished weight it deserved)

with *United States v. King*, 35 M.J. 337 (C.M.A. 1992) (expert testimony about pedophiles before members constituted plain error).

313. *United States v. Stringer*, 17 C.M.R. 122 (C.M.A. 1954).

314. As noted earlier, this choice is somewhat illusory in that the accused has to forfeit his right to a trial by his peers in order to avoid being sentenced by such an untrained sentencing authority. *See supra* notes 27-35 and accompanying text regarding the defendant's forum choices.

315. Adv. Comm. Rep. *supra* note 9, at 88.

316. *See supra* notes 27-35, 168-70 and accompanying text regarding factors affecting forum selection.

317. Defense counsel think an accused stands a better chance of acquittal before members. Thesis Survey *supra* note 163. However, this opinion was often offered with a caveat that it may be effected the nature of the charge and the defense. Most defense counsel agreed that court-members were easier to confuse and more likely to return equitable acquittals.

318. Adv. Comm. Survey, *supra* note 10, at 22. All members (except Navy CMR judges

who split evenly) overwhelmingly agreed that sentences from military judges are more consistent in similar cases than those determined by court-members.

319. *See supra* notes 248-68 and accompanying text discussing the training and qualifications of military judges.

320. *See supra* notes 212-220 and accompanying text discussing community input from court-members.

321. Thesis Survey *supra* note 163..

322. *Id.* This reflects a significant change from prior defense tactics. In 1983 defense counsel "seldom" offered waivers of trial or sentencing by members as an incentive for a pretrial agreement. Adv. Comm. Survey *supra* note 10, at 24.

323. *See* Adv. Comm. Rep. *supra* note 9, at 94.

324. Defense counsel and staff judge advocates noted that there are several circumstances in which the accused may fare better if sentenced by members (e.g. manslaughter, unsympathetic victim, an accused with an outstanding military record, offenses that prompt members to think to themselves "there but for the grace of God go I"). Thesis Survey *supra* note 163..

325. *See supra* note 139 discussing constitutional aspects of jury sentencing.

326. Adv. Comm. Survey *supra* note 10, at 21. Unfortunately, the committee did not offer a definition of what was meant by "substantial". Additionally, the responses became more mixed when asked if it would "appear" to deprive the accused of a substantial right. But as discussed earlier, the fact accuseds are waiving sentencing and trial by members in two of every three cases, and sentencing by members in eight out of ten cases, is a strong indication its not so important anymore. *See supra* notes 171 and 172 for statistics on court-martial composition.

327. *See supra* pp 35, 60-63 discussing the risks of appellate error associated with instructions to the court-members.

328. The counter-argument to command influence is that the remedy is not to revamp the entire process, but to prosecute those who commit such acts. Adv. Comm. Rep. *supra* note 9, at 45. The defect in this argument is that unlawful command influence is practically impossible to prove and is usually the result of ignorance as opposed to intentional acts. *See United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991).

329. *See supra* notes 279-281 and accompanying text discussing the risks of compromise verdicts associated with court-members.



330. *See supra* notes 177-82, 202-07 and accompanying text discussing sentence disparity and evidentiary limitations applicable to court-members.

331. *See supra* notes 175 and 176 and accompanying text discussing "forum shopping".

332. One could fashion an argument that the current requirement that the accused be sentenced by members in order to be tried on the merits by members, interferes with his 6th amendment right to a jury trial.

333. Adv. Comm. Survey *supra* note 10, at 20. Convening authorities felt that judges and members adjudged inappropriately severe or lenient sentences about equally as often. Judges and counsel felt members do so more often. As for who could better adjudge an appropriate sentence, only convening authorities favored members. Even defense counsel felt judges could better decide an appropriate sentence.

334. Several defense counsel commented that sentencing before members is ideal when you have a pretrial agreement, because the accused has nothing to lose in return for the chance at an unusually light sentence from the members. Thesis Survey *supra* note 163..

335. *See Byers, supra* note 8, at 89. In calendar years 1965 and 1966 the Army tried 3,029 general courts-martial. 67.4 % were guilty pleas. Of these guilty pleas, 80% were entered pursuant to a guilty plea, thus rendering the court's sentence a nullity, except in

those cases where it was less than that agreed to by the convening authority. Statistics of how many defendants "beat the deal" were unavailable.

336. Adv. Comm. Survey *supra* note 8, at 21.

337. *Id.* at 22.

338. See Adv. Comm. Rep. *supra* note 9, at 96 (citing RCM 1001(b)(4)).

339. One potential compromise that would continue to provide members a mechanism to contribute their views on the effect the adjudged sentence will have on discipline within the command is to permit the members to attach to their findings of guilt a recommendation to the military judge that in their collective opinion, the crime(s) committed warrant leniency or stiff punishment.

340. Westmoreland, *supra* note 16, at 21. "Some individuals are corrected by encouragement, some by exhortation, and others by criticism. How much and what type of correction is used is part of leadership. By far, most correction is done outside the system of military justice."

341. See *supra* notes 298-313 and accompanying text.

342. See *supra* text accompanying note 313.

343. See Vowell, *supra* note 60, at 96.

344. See RCM 1003(b).

345. See United States v. Balboa, 33 M.J. 304 (C.M.A. 1991).

346. See UCMJ 1984, arts. 26(c) and 37; United States v. Butler 14 M.J. 72, 74 (C.M.A. 1982). *But see* United States v. Mabe, 33 M.J. 200 (C.M.A. 1991).

347. See *Butler* 14 M.J. at 74, (C.J. Everett, concurring) (one of the two obvious reasons an accused would want to be tried by judge alone is a "desire to be tried by an official who is not under the command of the convening authority who referred the charges for trial").

348. See UCMJ art. 26; DEP'T OF ARMY, REG. MILITARY JUSTICE, Ch. 8 - United States Army Trial Judiciary -- Military Judge Program, (25 Jan. 1990).

349. All parties surveyed unanimously agreed that judges are much less influenced by emotion and arguments of counsel. Thesis Survey *supra* note 163..

350. *See supra* notes 212-220 and accompanying text discussing community input provided by court-member sentencing.

351. Twelve of fifteen military judges stated that the sentences of members do not effect the sentences they adjudge. Thesis Survey *supra* note 163..

352. All groups surveyed in 1983, except appellate judges and Marine Corps staff judge advocates agreed that judges are influences not to exceed the sentences adjudged by members in similar cases so as not to discourage requests for judge alone trials. Adv. Comm Survey *supra* note 10, at 21.

353. Albeit with the limitation that they cannot increase punishment for what they perceive to be an inappropriately lenient sentence. Since judges are much more likely to sentence within a reasonable range, chances are rare that there will be a need for corrective action.

354. Adv. Comm. Rep. *supra* note 9, at 14-15 (quoting testimony of Lieutenant General John Galvin before the 1983 Advisory Commission).

355. *See supra* notes 142-156. Forty-two of the fifty states have judge alone sentencing.

356. The adversarial process need not be abandoned in order to implement this change. For one, military personnel records of an accused often contain more information than

the typical federal presentence report. The military also has the advantage of our ability to order witnesses to testify. We also have the luxury of calling officers and noncommissioned officers, who live and work with the accused, to offer live testimony subject to cross-examination. Finally, "the soldier is in an environment where all weaknesses and excesses have an opportunity to betray themselves. He is carefully observed by his superiors -- more carefully than falls to the lot of any member of the ordinary civil community -- and all his delinquencies and merits are recorded systematically." See Magers, *supra* note 8, at 67.

357. "Incidentally, I have never had a convening authority complain about a sentence imposed by a judge...." Testimony of Major General Kenneth J. Hodson, before the 1983 Advisory Commission to the Military Justice Act of 1983. Vol. III, Adv. Comm. Rep. *supra* note 10, at 33.